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Speaking Truth to Power: A Treaty Forum

British Columbia
TREATY COMMISSION

Speaking Truth to Power: A Treaty Forum

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Speaking Truth to Power: A Treaty Forum

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Table of Contents

Table of Contents i

Introduction 1

Reconsidering the B.C. Treaty Process
James Tully 3

What Constitutional Law doesn't want to hear about History
Andrée Lajoie 19

Questioning Canada's Title to Land : The Rule of Law, Aboriginal Peoples and Colonialism
John Borrows 35

By any other Name
Roderick A. Macdonald 73

Trust, Acknowledgement, and the Ethics of Negotiation
Trudy Govier 95

Visions of Certainty: Challenging Assumptions
Mark L. Stevenson 113

New Zealand's Interim Treaty Settlements and Arrangements – Building Blocks of Certainty
Richard T. Price 135

Getting There!
Hamar Foster 165

Speaking Truth to Power: A Treaty Forum 181

Appendix 193

SPEAKING TRUTH TO POWER: TALK ABOUT TREATIES

Introduction

Treaty making is embedded in Canadian history. Early settlers readily acknowledged the necessity for their Sovereign to negotiate some kind of covenant with the Aboriginal peoples for the occupation of their land. This recognition led governments to adopt a policy in favour of treaty negotiation. As a result, numerous treaties meant to govern the relationship between Aboriginal and non-Aboriginal peoples now sharing various territories were signed. The treaty process did not, however, make it over the Rockies, with the consequence that the constitutional status of land tenure in much of the territory of B.C. remained uncertain.

Compelled by political imperatives, economic pressures and court decisions, the federal and provincial governments as well as the B.C. First Nations Summit agreed to remedy this situation of uncertainty by establishing, in 1990, the British Columbia Treaty Process. Negotiations have been underway since, with limited success.

In an effort to explore new paths towards the successful conclusion of treaties between First Nations and other levels of government, the Law Commission of Canada and the B.C. Treaty Commission co-hosted a forum in Vancouver, on March 2-3, 1999.

Negotiators, decision-makers and opinion leaders came together on that occasion to exchange information and ideas about treaty making in an atmosphere of openness and exploration. To facilitate the process, leading scholars in law, philosophy, political science and public administration were invited to prepare short papers under the following headings:

a) Historical and Constitutional Perspectives
b) Ethics of Negotiations
c) Visions of Certainty
d) Getting There

In each session, after the experts presented the key themes of their papers, commentaries were invited from designated individuals, in the interest of sparking discussions and broadening horizons. On every topic, 40 minutes were allotted for open-ended comments from the participants. Moderated by Stephen Owen Q.C. of the Law Commission, these discussions were not intended to be conclusive in any way but rather, to permit a frank airing of concerns and lead to a more informed and enlightened discourse on the subject of treaties.

Since treaty negotiations and their outcome affect many communities and individuals, the Law Commission and the B.C. Treaty Commission decided that the papers presented during the forum should be made available to the public along with a brief summary of the deliberations.

This collection is the result of a collaborative effort by the two commissions. The papers published here are the work of their respective authors writing as scholarly commentators. They do not, therefore, necessarily represent the views of either commission. We are most grateful to the experts invited to the session for revising their papers for publication in this format.

We hope that this collection will contribute to an improved public understanding of the significance of treaties for peoples and citizens, as well as a better appreciation of the differing perspectives and expectations of the parties involved in the treaty process. Finally, we trust that it will help to clarify the central elements of good faith negotiations between governments and First Nations and by doing so will engage all parties in a genuine commitment to reaching mutually satisfactory agreements.

RECONSIDERING THE B.C. TREATY PROCESS

James Tully

Introduction

It is a great honour for me to be asked to speak to you tonight, to present a 'keynote' address. I would like to acknowledge the Coast Salish peoples for extending their hospitality to us to gather here and discuss this important issue on their traditional territory. I would also like to thank the two hosts for inviting me to speak, the Law Commission of Canada and the British Columbia Treaty Commission. Specifically, I would like to thank Roderick Macdonald, the President of the Law Commission, who very kindly asked me if I would address the forum.

James Tully is Professor and Chair of the Department of Political Science at the University of Victoria and was formerly Professor and Chair of the Department of Philosophy, McGill University, Montreal. Professor Tully has written and spoken widely on the rights of Indigenous peoples in Canada and Australia, and on the treaty process in British Columbia. His more recent research is on Indigenous rights and treaties in international law. He was an advisor to the Royal Commission on Aboriginal Peoples and specifically for the Commission's vision of a new relationship. His book, "Strange Multiplicity: Constitutionalism in an Age of Diversity"*, considers how the self-determination of Indigenous peoples can be reconciled with Canadian and other common law constitutional democracies.*

It is difficult for me to address this audience for two reasons. First, you all know more about the treaty process than I do. Second, the honest and forthright discussions tomorrow are the forum in which we will speak truthfully to each other and try to work out if and why the treaty process has reached an impasse and, if it has, how the impasse can be dissolved. Therefore, I would be much more comfortable giving this speech tomorrow evening, after I have had the benefit of your presentations and the give and take of honest deliberations. Then, I feel I might be in a position to say something of significance about this difficult situation we are in and how we might move forward. I am sure that anything I have to say tonight, prior to the forum, will need to be corrected and perhaps discarded in light of our exchange of views tomorrow.

Nevertheless, I will try to say something this evening about some of the difficulties and blockages in treaty negotiations today and how we might use this opportunity to reconsider the treaty process. I doubt if what I have to say will strike the 'key note' for the forum as a whole. However, I hope it will help to make us appreciate the fundamental importance of this process for all Indigenous peoples and Canadians. Chief Justice Lamer was surely correct when he said that treaty making is the most important and most difficult issue facing Canada in the 21st century.

The Forum

Now, when a complex process of treaty making is established and set in motion in a hurry, unanticipated problems and difficulties arise, and there are invariably times when the process needs to be reviewed and reformed in extra-ordinary ways. So, the current reconsideration is not unusual in this regard. The pause for reflection should be seen as an opportunity. Such a review and reform must turn to the best available criticisms and recommendations. First, there are several criticisms of the many facets of the negotiations by the hard-working Aboriginal and non-Aboriginal negotiators over the last decade. These criticisms and recommendations need to be heard and incorporated in any reformation of the treaty process. I have immense respect for the First Nations, provincial and federal negotiators – for the time, energy and goodwill they have devoted to the complex stages of negotiation. Their participant criticisms and recommendations are primary and fundamental to any rethinking and reforming of the process. I hope that we discuss these criticisms tomorrow.

Second, there are important objections to the treaty process as a whole from the First Nations who have stayed outside the treaty process, the AFN, and from those who have decided to walk away from their tables. No review would be worthwhile without these objections and recommendations. I am sure we will discuss them tomorrow. Third, a number of criticisms have arisen and survived public scrutiny in the public discussions of the treaty process by citizens of British Columbia. These public concerns also need to be taken into account, for no treaty process will be legitimate and stable in a constitutional democracy if it fails to build public support among the citizens who will have to live and work in accordance with the arrangements agreed upon. I refer here not only to non-Aboriginal citizens who have raised concerns but also to Aboriginal citizens of First Nations who have raised concerns about the relation between negotiators and their communities, and about the effectiveness of the agreements that are being made. I trust that these criticisms will form part of our discussions. Fourth and finally, we need to hear from the professionals who have an expertise related to treaty making in Canada – lawyers, civil servants, dispute resolution experts, business consultants, academics, and so on. It is through the forthright exchange of objections and suggestions from these four communities of informed opinion that we will become clearer about the problems we face and the resources to resolve them.

I cannot pretend to review and summarize the constructive criticisms and recommendations that have been raised by these four groups in order to provide a framework for discussions tomorrow. Perhaps by tomorrow evening we will be in a position to perform such a task. What I can do this evening is something much more modest and provisional. This is to present a defeasible sketch in broad terms of how I see the predicament we are in and the general lines of a possible improvement. No doubt this sketch will not survive the discussions tomorrow, but it is at least something we can start with and discard as we progress beyond its shortcomings.

The Reasons for a new Relationship

First, recall the great importance of the treaty process. It was set up to establish a fair and lasting relationship between the First Nations, who have been organized in societies and have occupied the land since time immemorial, and the Crown, who asserted sovereignty in 1846. Such a fair and honourable relationship had never been established in B.C. Instead, an unfair and dishonourable relationship was established unilaterally through the reserve system and *Indian Act*, without the consent of Aboriginal people and in disregard of their rights. Indigenous peoples have demanded a fair and honourable relationship since the coming of the Crown, but the issue has been evaded by the Crown in B.C. as long as it could be: that is, until the *Calder* case in 1973. After *Calder,* it became clear that federal and provincial governments are under a moral and constitutional obligation, as well as for the honour of the Crown, to work out such a relationship and the treaty process was established for this purpose.

The First Nations, the Supreme Court, international law and liberal-democratic principles of justice converge on the conclusion that there is no turning back on this path. A just relationship has to be established, for reasons of constitutional and democratic legitimacy, but also for pragmatic reasons – stability, improving the social and economic conditions and capacities of native communities, Aboriginal self-government, developing a framework for land, water and resource use and for environmental protection. All these reasons were cited in the founding documents of the B.C. Treaty Process and they continue to bind us. Moreover, the polls show that the majority of British Columbians affirm these reasons and wish to see a lasting relationship established.

There are three main features of this new relationship between Aboriginal and non-Aboriginal British Columbians. First, it will be a relationship negotiated among First Nations, the federal government and the provincial government. Second, the relationship will be established by means of treaty negotiations in good faith, reinforced by judgements of the courts from time to time, and based on the consent of all three parties. Finally, the process as a whole will constitute the 'reconciliation' of 'the pre-existence of Aboriginal societies with the sovereignty of the Crown', in the words of the Supreme Court in *Delgamuukw.*[1] These are not exactly the words used in the early documents of the treaty process, but they are the words we have come to use as the process has developed and our understanding the rights of Aboriginal peoples has improved along with it. The new relationship thus embodies a powerful vision of how we can correct past wrongs and establish a new partnership based on the principles of both Western and Indigenous traditions.

If there is broad agreement on these three features of the new relationship among all the parties, then why is the process not proceeding smoothly? Why are many First Nations walking away from their tables and why are the voices of those First Nations who have remained outside the process gaining more support? Why, for example, were Herb George, Stewart Philip, Edward John, Phil Fontaine, Arthur Manuel and other Aboriginal leaders able to reach a consensus on a statement criticizing the treaty process on January 28, 2000?[2] Of course there are many important internal problems with the treaty process that can explain some of the difficulties and need to be addressed. The uncertainty generated by different interpretations of *Delgamuukw* is another factor.

However, I think there is a more basic problem underlying these internal difficulties, which is a major cause of the current inertia and dissent. The problem is that the participants have two very different understandings of the process. There is a basic difference in the way each of the three features mentioned above are understood by Aboriginal people on one side and federal and provincial governments on the other. The more I listen to Aboriginal, provincial and federal negotiators the more I am persuaded that this basic difference in understanding lies at the bottom of many of the difficulties. The two visions need to be understood and addressed at the forum tomorrow if we are to reconceive the treaty process in a way that is acceptable to all and enables us to move forward together towards reconciliation.

Two different Understandings of the Treaty Process

Let me now briefly outline what I see as the major differences of each of the three features of the process: the relationship, the treaty process and reconciliation.

The New Relationship

First, the federal and provincial governments see themselves as representatives of the Crown entering into negotiations with 'minorities' within Canada. Aboriginal people are understood to be 'First Nations' and 'Aboriginal peoples' *of* Canada, as the *Nisga'a Final Agreement* states.[3] That is, the First Nations are understood as minorities already in a relationship of subordination and some form of subjection to the Crown in Canada and B.C.

For many of the First Nations, this is to foreclose precisely what the negotiations should be about: namely, working out a new relationship between First Nations and the Crown in Canada and B.C. For the new relationship to become the subject of the negotiations and consent, the First Nations must be treated from the beginning as 'equal' in status to the federal and provincial governments, not subordinated as 'minorities'. These First Nations see themselves *as* 'First Nations' entering into treaty relations with the Crown in B.C. and Canada on an equal footing – on a 'nation to nation' basis – and aiming to work out a new relationship through treaty negotiations. If, in contrast, they are treated as minorities within Canada, then the old, unfair relationship continues to structure the treaty process and a form of 'colonization' or 'domestication' continues unexamined. That is, the *process of decolonization* of Indigenous peoples that the treaty process should address is evaded rather than confronted at the outset.

This vision of the fair starting point of the treaty process – of equal peoples – is grounded in the history of Aboriginal peoples' occupation and governance of their territories prior to the coming of the Crown and the continuation of that status into the present. It also finds support in the final *Report of the Royal Commission on Aboriginal Peoples,* which came out after the treaty process began. It also finds support in the evolving international law of Indigenous peoples. These documents could be used to reconceive this aspect of the treaty process.[4]

This does not mean that the First Nations are 'outside' Canada. The Supreme Court has explained that the Constitution of Canada has the capacity to recognize 'peoples' with the full right to 'self-determination' under international law within the framework of the Constitution, and to reconcile this with the other members of Confederation.[5] It does mean, however, that there is an irreducible international dimension to treaty making. Thus, from this vision, if the treaty process is to get off on the right foot, then it should start from a position of equality of the peoples entering into the negotiations.

The Purpose of the Treaty Process

For the federal and provincial governments the purpose of the treaty process is understood against the background of the Comprehensive claims policy of 1986. As a result, the problem the treaty process is understood to address is that Aboriginal peoples have 'undefined Aboriginal rights' at the common law, under section 35 of the *Constitution Act, 1982*. The solution is to move from undefined Aboriginal rights to well-defined treaty rights under the Constitution. The way to move from one to the other is through treaty negotiations, as in the *Nisga'a Final Agreement*. The result will be that all the outstanding Aboriginal rights will be 'modified' and 'continued' in to the rights enumerated exhaustively in the treaty document and protected under the Constitution. This process constitutes the 'release' and 'surrender' of *all* outstanding Aboriginal rights. It brings 'certainty' to the First Nations and to British Columbia.[6]

Many of the First Nations see the purpose of the treaty process in a completely different light. They see the vision I have just described as a modified form of 'extinguishment' policy and thus intolerable. They do not see their Aboriginal rights as 'undefined' or uncertain. Their rights are title to their traditional territories and rights of self-government as nations. That is, their rights are the rights of self-determination of peoples. They are, or will be, recognized not exclusively in domestic law, but also in international law and in their own legal institutions and traditions.[7] Aboriginal peoples come to the table with these rights. Three consequences follow from this vision regarding the character of treaty negotiations.

First, these rights to land and self-government of peoples are ***not*** what the treaty process is about. These rights already exist and '*co-exist*' through the treaty negotiations, just as the rights of B.C. and Canada *co-exist* through the negotiations. They acknowledge that the Crown has title to the same lands and that it has rights of self-government as well. This too is not the issue. Neither party gives up their title to their lands. This is what 'equality' means. Rather, the problem the treaty process should address is, given that the titles to land overlap and the exercise of the powers of governments overlap, how do we *share* land and political powers in fair and honourable partnerships that respect the equality and co-existence of the partners. The purpose of treaties then is to work out relations of ***mutual sharing*** among equal and co-existing partners.

First Nations derive this understanding of treaty making *as* the process of working out relationships of sharing over land, resources and governance from their history of 500 years of treaty making in North America. I do not think that it was even considered by the provincial and federal governments when the treaty process was first set up. However, the *Royal Commission on Aboriginal Peoples* considered and affirmed it in the final *Report* of 1996.[8] In addition, this vision of treaties in the spirit of equality and co-existence was employed by the *Royal Commission* to criticize and call for the reform of the Comprehensive claims policy, just as the Treaty Seven Elders, the AFN, the Interior Alliance and the B.C. Summit have done more recently.[9]

I think that *Delgamuukw* has had its largest effect on this area of the treaty process. On the federal and provincial governments' vision of the treaty process, First Nations exchange their undefined rights over their traditional territories for clearly defined rights to land and resource allotments and compensation for the traditional territory they agree to abandon. For the Nisga'a this involved abandoning 'undefined' rights over about 80 per cent of their traditional territory. It is unclear why a First

Nation should agree to this after *Delgamuukw*, since they are now said to have 'exclusive title' over 100 per cent of the land occupied by their ancestors at the time of the assertion of sovereignty by the Crown. Of course, this is subject to a difficult 'onus of proof' and, after that, to infringement with consultation and compensation. Even so, it appears to many First Nations to be more attractive to litigate than to negotiate away 80 per cent or 95 per cent of traditionally occupied territory. (And, it has been argued that the 'onus of proof' could be reversed.[10]) So, although the Supreme Court certainly did not endorse the Aboriginal vision of co-existence and sharing, it did move some distance from the Comprehensive claims policy towards the co-existence vision preferred by First Nations and the *Royal Commission.* As a result, if First Nations are to return to treaty negotiations, the process needs to be reformed in a way that makes it more compelling than litigation appears to be. However, on the other hand, the federal and provincial governments may believe that this is a misinterpretation of *Delgamuukw;* that the outcome of going to court would be less than the offers in the current treaty process.[11]

The second consequence of seeing the treaty process in this light is that it involves a diplomacy of rituals and story-telling in which the participants explain to each other who they are, their cultures and ways, how they relate to the land, and how they might negotiate and join arms together while respecting these differences. The treaty negotiations are about constructing a genuinely bi-cultural treaty process. It is not only an interest-oriented practice governed by one set of procedures, but also an identity-oriented practice aimed at mutual understanding by the exchange of stories. This is not a contingent, pre-negotiation exercise in burning sweet-grass. It is the heart of transforming the relationship among Aboriginal peoples and British Columbians because it is the way to unseat deeply sedimented misunderstandings of history and relationships. If mutual understanding is not achieved through dialogues in which narratives and histories are honestly exchanged, then no negotiation or partnership across these cultural differences will generate the required level of trust and solidarity. And, for the treaty process to be well-supported in the wider communities, this kind of mutual education needs to take place throughout the province.

If these alternative dispute resolution dialogues are taken seriously, we can see another reason why the vision of the treaty process modeled on the Comprehensive Claims Policy is unacceptable to many First Nations. The first story Native people always tell their listeners is of their relation to their traditional land and waters. Their identity is internally related to the ecological region in which their community has lived for so long. This is what the term 'indigenous' means. To expect them to give up 80 per cent to 95 per cent of this is to ask them to cease to be Haida, Coast Salish or Nuu-Chah-nuulth – to cease to be Aboriginal. If the treaty process is to be a process that 'reconciles' Indigneous peoples and the Crown, rather than a process that assimilates Indigneous people to a non-Indigenous identity, then it needs to be a process that respects this relationship of identity to the traditional land and waterways.

The *third* consequence of this vision of the process is that treaties are conceived as specific, short-term, pragmatic and renewable agreements among partners aimed at specific problems faced by the Native community involved. Since they are not aimed at the immensely complex issues involved in giving up large tracts of traditional territory in exchange for land and resource rights in highly technical language, they can concentrate on more immediate problems of how to share and co-manage land, resources, powers of self-government, capacity building, and economic partnerships, in order to strengthen Native communities and to build mutually beneficial ties with the neighbouring non-Aboriginal communities. Of course, there are difficult negotiations over which lands are to be used exclusively and what sort of sharing is involved over other lands, but the extra pressure of large, once and for all agreements is removed. The specificity of these treaty negotiations brings with it a different and distinctive kind of *'certainty'*; more akin to the familiar certainty of renewable business contracts, in contrast to the certainty of a final and definitive settlement of Aboriginal rights that the present model promises, but has yet to deliver except in one case.

Reconciliation

The third and final difference between the two understandings of the treaty process is the idea of 'reconciliation'. Recall that the Supreme Court described the overall process of reconciliation achieved by treaty negotiations in the following way:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve … "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".[12]

For the federal and provincial governments, 'reconciliation' is understood, as we have seen, as a 'full and final settlement' of outstanding Aboriginal rights by means of treaty negotiations that lead to a final *Agreement* which exhaustively sets out section 35 rights. This is the wording of the *Nisga'a Final Agreement* and it is preceded by a restatement of the above quotation from *Delgamuukw* in the Preamble.

Most First Nations, in contrast, look back to the contact era history of treaty making for an alternative vision of 'reconciliation'. For them, reconciliation is an ongoing activity, a continuous process of cross-cultural dialogue over time, between the partners over matters of their shared concern. Individual treaties are made within this broader process of discussion and they are implemented, enacted, and periodically reviewed and repolished as things change and unanticipated consequences emerge. That is, the treaty process never ends. The process *is* the relationship of democratic and constitutional governance between First Nations, the federal government and the provincial government in which they make treaties, review, dispute, amend, resolve and renew them over time.[13]

This is one of the deepest differences in understanding between Aboriginal peoples and the federal and provincial governments over the treaty process. For the federal and provincial governments, the treaty process is something that is reconciled by bringing it to an end as quickly and effectively as possible. This aim has been difficult to achieve for the reasons I have outlined. As a result, the process has bought neither finality nor certainty. It is important to remember that the non-Aboriginal opponents of the treaty process agree with First Nations on this fundamental point. Their major objection to the process is that the final agreements are placed beyond review and renewal, protected by the Constitution. Therefore, if the treaty process was reconceived more along the lines of an ongoing, democratic relationship of reconciliation, in which the parties negotiate and renegotiate their specific partnership over time, it might overcome some of the present difficulties *and* gain more public support on both sides.

I also believe that this view of reconciliation as a continuous process rather than an end state is closer to the vision of the Supreme Court. In the *Reference re the Secession of Quebec* the Court advances a vision of Canadian constitutional democracy as a global system of rules and practices in which the diverse members of the Canadian Confederation 'reconcile diversity with unity' over time by means of 'processes of continuous discussion and evolution' in accordance with fundamental constitutional principles.[14] This general concept of reconciliation is surely the same one applied to First Nations in *Delgamuukw*. It seems to me that if the B.C. Treaty Process was reconceived along these lines, it might not only work more effectively, but also be more in tune with the evolving constitutional democracy of which we are all members.

Conclusion

I have tried to set out a brief sketch of the main differences in the two main visions of the treaty process. The conflict between them is, I believe, one of the major causes of the disagreements surrounding the treaty process. I am sure they can be formulated more clearly than I have done.[15] Nevertheless, I suggest that the differences need to be addressed in some form or another tomorrow if we are to clarify the process in which we have become entangled and see the possibilities for moving forward towards reconciliation.

These two conflicting visions are not cast in stone. There is room to learn by reciprocal elucidation of the strengths and weaknesses of each and to modify them accordingly. They need not be irreconcilable. It may be possible at the end of the day to imagine a 'middle ground' treaty process, which is flexible enough for the participants to retain what is fundamental to them in each of their modified visions, yet still be able to negotiate together in good faith and reach fair and honourable agreements. This would itself be a step not only *towards* reconciliation, but also *of* reconciliation.

REFERENCE NOTES

[1] *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R. 1010, [hereinafter *Delgamuukw*], reprinted in S. Persky, Delgamuukw: *The Supreme Court of Canada Decision on Aboriginal Title,* (Vancouver: Douglas and MacIntyre, 1998) at para. 168.

[2] '*Statement of The Assembly of First Nations, including the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit*', released Friday, January 28, 2000.

[3] The Government of Canada, the Government of British Columbia, and the Nisga'a Nation, *Nisga'a Final Agreement* (Victoria, B.C.: Ministry of Aboriginal Affairs, 1998), Preamble, clauses 2, 3 and 6 at p. 1 [hereinafter *Nisga'a Final Agreement*].

[4] For these documents, see Canada, *Report of the Royal Commission on Aboriginal Peoples, Restructuring the Relationship,* Part One, vol. 2 (Ottawa: Canada Communication Group, 1996) at 163-212 [hereinafter *Restructuring the Relationship*].

[5] *Reference Re Secession of Quebec,* [1998] 2 S.C.R. 217, paras. 109-136 [hereinafter Reference Re Secession of Quebec]. For an important discussion of these paragraphs see J. Borrows, "Questioning Canada's Title to Land: Aboriginal Peoples and the Rule of Law", This Volume.

[6] *Nisga'a Final Agreement, supra* note 3, clauses 22-29 at 20-21.

[7] For example, S. H. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, B.C.: Theytus Books, 1998).

[8] Canada, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back,* vol. 1 (Ottawa: Supply and Services Canada, 1996) at 675-695.

[9] Canada, Royal Commission on Aboriginal Peoples, *Treaty-Making in the Spirit of Co-Existence* (Ottawa: Canada Communications Group, 1993).

[10] K. McNeil, 'The Onus of Proof of Aboriginal Title' [Forthcoming, Osgoode Hall *L. J.*].

[11] This has been suggested by Gurston Dacks, 'Litigation and Public Policy: Lessons from the *Delgamuukw* Decision', (paper presented at the Joint Annual Meeting of the Canadian Political Science Association and the Société québécoise de science politique, Quebec City, August 1, 2000).

[12] *Delgamuukw, supra* note 1 para. 168.

[13] *Restructuring the Relationship, supra* note 4 9-104.

[14] *Reference Re Secession of Quebec, supra* note 5 at paras. 32-82.

[15] For an important forthcoming formulation of these differences, see T. Alfred, 'Deconstructing the British Columbia Treaty Process', (a paper prepared for The Assembly of First Nations, August 2000).

WHAT CONSTITUTIONAL LAW DOESN'T WANT TO HEAR ABOUT HISTORY

Andrée Lajoie

Ms Lajoie is Professor of Law at the Centre de recherche en droit public of the University of Montreal. She has written extensively on issues pertaining to law and society, and has received numerous distinctions for her research. She has been an adviser to the Royal Commission on Aboriginal Peoples, and a member of the Advisory Committee on Administrative Law for the Law Reform Commission of Canada. Ms Lajoie is a Member of the Law Commission of Canada's Advisory Council.

It was perhaps not entirely by accident that Rod Macdonald wrote me in for this first session of a workshop entitled *Speaking Truth to Power*, given my reputation for saying what I consider to be the truth – and, as will become evident as I proceed with this presentation, far be it for me to claim that there is only one truth – not only to power, but to everyone, be it right or wrong. Actually, I am delighted to be given this encouragement to speak openly, to be my true self, and to imagine indeed that it will be useful to you...

But then, as happy as I am with the title of the workshop, I have to say that the one given to this session leaves me rather uneasy: the "and" in *Historical* **and** *Constitutional Perspective* strikes me as paradoxical. This is because in Canada, the constitutional perspective, especially as applied in the legal but also, to a large extent, in the political context, seems precisely to ignore history instead of benefiting from the many lessons it has to offer. Let me note from the outset that this ignorance is not by happenstance; nor do I harbour the illusion that the situation will ever change. But still, perhaps there is a spark of hope in the fact that we are gathered here with the chief negotiators representing Aboriginals, Canada and British Columbia, presumably open to what we have to say. It is with this in mind that I will successively speak of what history has taught us, directed mostly at judges and Canadian political decision-makers, followed by a review of constitutional law, enabling Aboriginal negotiators to take it into account, and finally, closing with perspectives for the future.

The Teachings of History: The Survival of Legal Pluralism

Because I am not a historian, it might be considered pretentious on my part to propose my views of what Canadian history teaches us about Aboriginal matters, and I would not dare to do so, had I not worked at length with historian colleagues who specialize in the status of Aboriginals in Quebec and, moreover, had I not briefly picked the brain of my colleague Borrows for some insight about the situation in British Columbia.

If I got it right, the situation in both cases, at least today, is comparable: the result of pure colonization, nothing conquered nor ceded. In fact, before the James Bay – Northern Quebec Agreement, no treaty was signed with Aboriginals in Quebec, other than the alliance treaties established during the French Regime, when colonizers simply entered into alliances already established by the Aboriginals for their own military purposes. No cession of land nor political power took place. If my understanding of what happened here is correct, the situation in British Columbia, other than the zone affected by the Nisga'a Treaty, would be the same over 99 per cent of the territory. The remaining 1 per cent would consist of the Peace River enclave, included in the zone covered by Treaty No. 8, which is mostly in Alberta and the Northwest Territories, and of a small area of Vancouver Island, affected by Peace and Friendship treaties, where there was never any question of cession. I will, therefore, allow myself to make an analogy and suggest that the legal conclusions we drew in the study we conducted for the Dussault-Erasmus Commission on the status of Aboriginals in Quebec[1], can largely be transposed to British Columbia, in spite of the possible differences which may later have to be accounted for, based on further research.

European colonization took place in Quebec before anywhere else in Canada, but it took place with less hegemony. Indeed, throughout the French Regime, the Aboriginals and French lived side by side on land that they occupied on the basis of different, but compatible, symbolic representations, materialized in alliance treaties without Aboriginals ceding any territory. The rules that translated their respective relationships to the land were incorporated in distinct legal orders which were still intact when British rule came. Since there had been neither a military conquest by the French, nor any Aboriginal behaviour that could be held to signify the collective subordination of any of their Nations, it is not possible to conclude that the Aboriginal and French legal orders had merged. The territory of Quebec, therefore, came under British rule in a situation of legal pluralism in this regard and the Royal Proclamation applied there in the same manner as everywhere else.

What then, two centuries later, has become of these once autonomous legal orders and of the status and rights they defined for Aboriginal peoples?

There have been many events and statutory enactments since the Royal Proclamation, but it is difficult to discern their scope and impact, especially because it is not easy either to clearly identify the successive criteria by which international law has recognized – over the years, and to this day – what exactly counts as an act of subordination by a people, or to find any proof of a fusion between once distinct legal orders…

First, there have been military, demographic and economic events that quite possibly had a significant political impact – but with unclear legal implications. The last time Aboriginal peoples acted as allies of the British was during the American war of 1812; after this, their military support was no longer required to maintain the colony. A steady demographic decline in the number of Aboriginal peoples, to the current approximate level of 2.8 per cent of the Canadian population, followed. Finally, economic dependence escalated, as was only too abundantly and sadly proven during the public hearings of the Dussault-Erasmus Commission. On the other hand, a new power dynamic, more favourable to the Aboriginal peoples, has recently emerged, mainly through successful international strategies.

Then there were laws: constitutional and domestic. However, none of the Constitution Acts passed in succession – in 1774, 1791 and 1840 – up until Confederation, mentioned the status or rights of Aboriginal peoples, nor did any domestic statute affect the pluralistic basis of their status or their rights in Quebec. Then, in 1867, the Parliament of Canada was given legislative authority over Indians, and Lands reserved to Indians,[2] which also applied to British Columbia once it entered Confederation a few years later, in 1871.[3] At this time, Quebec, where only alliance treaties had been signed under the French Regime, and British Columbia, having just signed the Peace and Friendship treaties in 1850, found themselves in the same legal position as regards the status of Aboriginal peoples.

Other domestic statutes potentially affecting Aboriginal peoples have been adopted since 1867 but these are difficult to identify, let alone interpret, if only because it is hard to determine which texts indirectly address Aboriginal issues. In Quebec, none of those identified affect the pluralistic basis of the status and rights of Aboriginal peoples.

The time allowed to prepare for this forum was not sufficient for me to research the statutes that might have affected the situation in British Columbia. In addition to actually locating these statutes, it would also have been necessary to look into whether their effects were the same as in Quebec, and to identify their differences, if any. What is important though, in both cases, is that the statutes could only have an impact if read with the Canadian legal order, unless the Aboriginal legal orders had come to merge within the Canadian legal system.

Yet, to prove whether such a merger did or did not take place, it would be necessary to conduct anthropological research on the individual Aboriginal Nations to establish the existence of original legal orders and then prove whether they persisted or not. But we do not even have guidelines on which to base such research: What would constitute collective political acts of subordination on the part of various Aboriginal peoples? Would the compliance of individuals with the provisions of the *Indian Act*[4] relating to Band

Council elections? Would exercising the right to vote in federal and provincial elections? Would accepting subsidies and grants of all kinds?

Which brings us back to **the** fundamental question of law: At what point exactly does constant individual behaviour become normative? Is this merely a question of numbers? Of the collective character of consent? How is it recognized and who (and how many) decide(s) what the guiding criteria will be? Only at the conclusion of both theoretical and empirical research like this – in constitutional law as well as in legal theory and the anthropology of law – could one hope to shed some light on the contemporary legal status of Aboriginal peoples in Quebec and British Columbia alike. What is more, there is the fact that the results emanating from such research studies would have to be considered with modesty and honesty because, they too, would reflect the social and historical location of their authors. "History will never be scientific" (trans.) wrote Paul Veyne, a historian of *Collège de France*.[5] Even less so law, we might be tempted to add.

Given the circumstances, and considering the lack of certainty just described, the least irrational bet we can make is that the original Aboriginal legal orders have survived. Failing proof of any merger or disappearance by conquest or act of subordination, we are confronted by a situation of extra-state pluralism – namely, the *de facto* coexistence of the Canadian legal order and those of the various Aboriginal Nations.

Admittedly, this way of looking at reality is not terribly consonant with the expectations of a normally constituted nation state, and is quite at odds with the expectations of its courts – the guardians of law. Political authorities, by contrast, have to operate within the constraints of ongoing negotiations, which constraints require them to be more realistic.

The Constitutional Product: Denying the Lessons of History

Constitutional interpretation, in Canada as elsewhere, manifests itself as much in the legal reasoning of the courts as in the political practices that result from negotiations. In fact, both ignore the extra-state legal pluralism that results from this interpretation of history, as this audience well knows. Nonetheless, it can't hurt to bring it back to consciousness.

Take first judicial power: despite the reputation of the Supreme Court with the public at large, who sees it as the champion of Aboriginal rights, the Court has not only failed to weigh the consequences of this extra-state pluralism, it has actually done the opposite by systematically refusing to recognize the political rights of Aboriginal peoples.

In *Pamajewon*,[6] the Supreme Court was invited to recognize that all of the requirements for self-government are included in the ancestral rights constitutionalized in section 35 of the *Constitution Act, 1982*. Nonetheless, it refused the invitation to acknowledge the existence of even the weaker form of intra-state pluralism, affirmed by the Dussault-Erasmus Commission. The Court then concluded that each power being claimed would have to be examined individually in context. When the time came to examine each of these political powers individually in their respective contexts, the Court refused to acknowledge each and every one – whether the issue was taxing power,[7] or autonomy with regard to provincial labour legislation,[8] gambling,[9] or even traditional Aboriginal political rights,[10] the rights of Aboriginal women,[11] or rights of the birth parents of Aboriginal children.[12]

In the end, of the 11 decisions the Court has rendered over the years on strictly political Aboriginal appeals, the only three concessions made to Aboriginals consisted of recognizing the Aboriginal identity of certain groups: "Eskimos",[13] Aboriginal peoples living off-reserve,[14] and the equality of Aboriginal peoples with non-Aboriginals in criminal matters.[15] The high percentage of Aboriginal legal defeats on questions involving political rights can be set in contrast with the Court's openness in matters of economic rights, where there have been almost as many victories, weak as they may be, as defeats[16]. The Supreme Court has not been so kind to social minorities – women, gays and lesbians – which to date have never been allotted any public funds whatsoever.[17]

It is easy to imagine how, aware of the impact that Aboriginal power and land claims could eventually have, the Court might be willing to offer *quid pro quo* recognition – usually "in principle" of course – of economic rights, even in the form of natural resources, though it may only be giving with one hand something that it still holds with the other…

I will only give one example from the many cases that might be considered since the Supreme Court was created:[18] in *Delgamuukw*,[19] as everyone here is quite aware, the Court authorized oral evidence regarding the extent of territory over which it recognized "*quasi*" -ownership rights; however, it was careful to mention, in the same breath, that these rights did not include the choice of any use that would be incompatible with the territory's historical use… Such choice was reserved for the Crown. Talk about cynical!

In fact, Aboriginal peoples have no hope of obtaining neither political power nor land ownership *via* the courts which – Nation State "oblige" – must preserve the integrity of the Canadian State of which they are an integral part, all in the name of rule of law and Canadian sovereignty.

Given this context, can Aboriginal peoples hope for something better in the agreements resulting from constitutionally-mandated permanent negotiations (something encouraged by the courts and perhaps their most valuable contribution)? If the past is any indication, the answer is: a little better…

That is, even though the two boundaries preventing the recognition of Aboriginal political power and land ownership is sacred for the courts, it will, nonetheless, be crossed by political players, at least to some extent, *i.e.* never on both fronts at the same time, and always while reaffirming Canadian sovereignty…

Hence, there have been several instances where political powers in the nature of normative jurisdiction were recognized to various Aboriginal communities. For instance, federal legislation has recently added the *Framework Agreement on First Nation Land Management,*[20] to Canadian law. The Aboriginal Band Councils of Canada are free to adhere to this agreement which provides for the management of Aboriginal lands by the First Nations having subscribed to a land code which applies to their respective territories in the matters specified in the *Agreement.* Similarly, there have been a *Statement of Understanding and Mutual Respect*, a *Blanket Agreement* and 10 *Sectoral Agreements* signed between Quebec and the Mohawks of Kahnawake, addressing three areas respectively: law enforcement,[21] certain civil rights issues,[22] and certain economic issues.[23] These provide for either the replacement of Quebec law by its Mohawk equivalent or the coordination of the two normative systems on the Kahnawake reserve.

In both of these cases, we are looking at limited agreements in terms of territory – the first being limited to the lands controlled by the Band Councils who signed the Agreement; and the second, to the Kahnawake territory. In terms of jurisdiction, on the other hand, the first covers land management and the second covers 10 regulated areas and any others that may be added. Two other agreements have a wider normative impact. These are: the *Nisga'a Treaty*[24] and the *Agreement Between the Inuit of the Nunavut Settlement Area and her Majesty the Queen in Right of Canada*[25] which, in the long run, will include jurisdiction over most areas of internal self-government.

These political gains, however, come only with concessions in exchange. Thus, the treaty signed with the Nisga'a is constitutionalized under section 35 of the *Constitution Act, 1982,* but it grants powers only in regard to the Nisga'a themselves and not over the other inhabitants of the land; and the one signed with the Inuit of Nunavut covers all inhabitants of the land, but it is not constitutionalized. Both are signed subject to the residual application of Canadian law, where foreign affairs and international sovereignty remain intact under federal jurisdiction. Moreover, the tax exemptions that were previously granted to the Nisga'a will be gradually eliminated.

In other words, except in Kahnawake, where Quebec has left taxing power to the Mohawks without taking anything away, actually granting them subsidies as well, the situation is unfolding as if the *quid pro quo* granted by the tribunals had been reversed by political actors, with fiscal advantages cancelled in exchange for the recognition of greater political powers.[26] As if Aboriginals had to choose between their political rights and economic advantages which, as we know, are part of a precarious balance…

The moral of this story is that the story is not moral but political… It is governed by the rules of politics, namely power and goodwill.

Take the question of power first: I will no doubt be considered cynical for mentioning it out loud, and especially for making it my first point. But it is impossible to ignore power, and to minimize it would be unrealistic and, indeed, show a lack of integrity: certainly, it would not be "speaking the truth to power". Hence…

As long as there were more Aboriginal people on the land, as long as colonizers, content to trade, had not really settled yet, and as long as Aboriginal people knew better than the newcomers how to survive in this world, they more or less dominated the power relationship. Yet, even then, their lack of knowledge of the value of goods Europeans were offering them in exchange for their furs prevented them from dictating the terms of exchange: exploitation from the start. The inversion of the demographic ratio and the development of capitalism did the rest to tilt the balance of the power relationship increasingly against them, until it was recently partially tilted back. The effects of this tilting back in favour of Aboriginal peoples, although modest, are being felt in legal and political forums alike.

In the courts, the per centage of Aboriginal victories, some of which are indeed only partial and moderate in effect, has nonetheless reached 50 per cent since 1990, having been on the rise over the two preceding decades (36 per cent in the 70s and 80s, and

37.5 per cent in the 80s and 90s). This has recently given Aboriginal stakeholders the impression of a greater openness towards their concerns.[27] So too, in negotiations with political players: in 1998, there were over 80 discussions held between Aboriginals and the Government of Canada on self-government alone.[28] Not to mention those held with the provinces, some of which led to productive results as I just illustrated.

There was obviously a power relationship in both cases: why would the courts grant Aboriginals the public funds and tax exemptions they refuse to concede to social minorities if not to calm the political and land claims that only the Aboriginals can credibly advance? Social minorities do not have this weapon. To get a bit, you have to be able to claim a lot: the most basic of negotiating rules in any domain. Accordingly, Canadian politicians have had to make some concessions in terms of territorial control and self-government. Although the tone and duration of negotiations did not show any particular eagerness on their part to fulfil the desires of those on the other side of the table, it is not by coincidence that they granted them the little they did. How is it that the pendulum of power is finally swinging in favour of Aboriginals after so long?

In my opinion, there are two mechanisms at play and, combined, they generate a political end product: there are pressures coming from internal legal strategies and from international political strategies, both of which are intended to influence decision-makers by marshalling public opinion. First and foremost, Aboriginal groups have been quite realistic in using the courts, not as referees to render final decisions on issues, but with two other purposes in mind: one being to gain exposure for their claims with the media, and the other to open up space for political negotiations.[29] They know that judges never fail to refer parties to this forum, in fact, they make a point of it.[30] In addition, Aboriginal groups have successfully used international forums, namely through the *Working group on Indigenous populations* initiated by the *sub-commission on the Prevention of Discrimination and the Protection of Minorities* of the *UN Economic and Social Council Human Rights Commission* where, through the narrative process,[31] they began by asserting their identity and then promoted their claims.[32]

The success of this process is directly linked to the development of an international civil society, which we recently saw at work in another area in Seattle. This development is all the more significant since the NGOs opposed to the WTO publicly stated how important environmental groups are to their collective organization, and environmental groups are closely linked to Aboriginal issues at the international level. From the perspective of legal theory, it might be said that an international universal audience is emerging, in the sense in which Chaim Perelman uses this expression[33] – that is, an international community that can be referred to for setting the hierarchy of values that will guide the law making process.

More simply put, chances are that, in future, national governments will increasingly have to take these international factors into account in developing and applying their policies with Aboriginals or any other citizens.

We must not make too much of this though: this more balanced power relationship is fragile, and its preservation will depend on how realistic stakeholders are in handling it. If Aboriginal negotiators fail to insist on the economic self-sufficiency that underlies the possibility of self-government, they will be deceiving themselves and would eventually lose the political momentum they have worked so hard to gain. If, on the other hand, their Canadian counterparts, federal or provincial representatives, continue to act as if legal pluralism had disappeared from the Canadian scene – something they would have a very hard time proving in terms of when and how it happened – they would quickly find themselves confronted with a hostile international public opinion and maybe even undesirable events.

It is therefore not for the sake of morality – as I have already said, this story has no moral, but in the interest of all concerned that we recommend to both sides to act in goodwill in searching, not only for imaginative political solutions, but also for meaningful economic development proposals for Aboriginal communities. The former should not exclude any valid formula, be it the independence of distinctly autonomous groups, or regimes inspired by pre-Westphalian notions of personal law, or indeed, any type of power structure likely to give voice to the plurality of interests at stake.

The latter should recognize the communal economic development activities of Aboriginal peoples – which courts have tended to consider as infringements on provincial jurisdiction, or even criminal offences, as in the case of casinos for instance – as a new state of evolution in the Aboriginal relationship with land and resources. As difficult as this may seem in our present era of neo-liberalism, we should remember that the traditional self-sufficiency of Aboriginal peoples was precisely based on communal activities organized in solidarity by a non-hierarchical authority. Can we claim to have done any better since?

To forget this would be just as serious for the negotiators as it would be for the courts to continue refusing history's lesson of pluralism. As you can see, the fact that this story has no moral has not prevented me from lecturing you on morals... I have taken the liberty of doing so in an attempt to forestall the potential consequences of what Freud called "the return of the suppressed", to which, infamously, the political process is just as subject, as individuals...

REFERENCE NOTES

[1] A. Lajoie, J.M. Brisson, S. Normand and A. Bissonnette, *Le statut juridique des peuples autochtones au Québec et le pluralisme*, (Cowansville: Les Éditions Yvon Blais, 1996). A number of excerpts are taken up here to summarize the work's conclusions.

[2] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3, s.91 (24), reprinted in R.S.C. 1985, App. II, No. 5.

[3] *The British North America Act, 1871* (U.K.), 34 & 35 Vict., c. 28, *An act respecting the establishment of provinces in the Dominion of Canada.*

[4] Currently: R.S.C. 1985, c. I-5. For background on this legislation, see: Treaties and Historical Research Center, *Historical Development of the Indian Act*, (Ottawa: Indian and Northern Affairs Canada, 1978).

[5] P. Veyne, *Comment on écrit l'histoire. Writing History: essay on epistemology* (Middleton, Connecticut: Weyslane University Press, 1984). Taken up again in Collection Points, 1993 at 117-122.

[6] R. v. *Pamajewon*, [1996] 2 S.C.R. 821 [hereinafter *Pamajewon*].

[7] *Westbank First Nation* v. *British Columbia Hydro and Power Authority,* [1999] 3 S.C.R.I. 134, *St. Mary's Indian Band* v. *Cranbrook (City)*, [1997] 2 S.C.R. 657.

[8] *Four B Manufacturing Co. Limited* v. *United Garment Workers of America and Ontario Labour Relations* ,[1980] 1 S.C.R. 1031.

[9] *Pamajewon, supra* note 64.

[10] *Davey* v. *Isaac,* [1977] 2 S.C.R. 897.

[11] *Canada (Attorney General)* v. *Lavell,* [1974] S.C.R. 1349; *Native Women's Association of Canada* v. *Canada*, [1994] 3 S.C.R. 627.

[12] *Natural Parents* v. *British Columbia (Superintendent of Child Welfare),* [1976] 2 S.C.R. 751, (where rights, although recognized in principle, were not applicable in practice).

[13] *Re Eskimos,* [1939] S.C.R. 105.

[14] *Corbière* v. *Canada*, [1999] 2 S.C.R. 203.

[15] R. v. *Drybones,* [1970] S.C.R. 282.

[16] I shall not dwell any further on the argument made in A. Lajoie, E. Gélineau, I. Duplessis and G. Rocher, "L'intégration des valeurs et des intérêts autochtones dans le droit canadien" [The Integration of Aboriginal Values and Interests in Canadian Law] [forthcoming in 2000] [hereinafter "Intégration des valeurs"], relating to the conclusions referred to herein. Suffice it to say that out of 37 decisions identified as having to do with economic rights – mostly hunting and fishing – there were 18 victories, however watered down the actual outcome was in some of these cases...

[17] See: A. Lajoie, E. Gélineau, R. Janda, "When Silence is no Longer Acquiescence: gays and lesbians under Canadian law", (1999) 14:1 *C.J.L.S.* 101-126; and, A. Lajoie, M.-C. Gervais, E. Gélineau and R. Janda, "La majorité marginalisée : le trajet des valeurs des femmes vers le forum judiciaire et leur intégration dans le discours de la Cour suprême" [The Marginalized Majority: women's values making their way to the legal forum and their integration to the Supreme Court], [forthcoming in *R.J.T.* in 2000].

[18] For a more complete, if not exhaustive, list see: "L'Intégration des valeurs et des intérêts autochtones dans le droit canadien", *supra* note 16.

[19] *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R. 1010 [hereinafter Delgamuukw].

[20] Brought into effect with *An Act providing for the ratification and bringing into effect of the Framework Agreement on First Nation Land Management,* S.C. 1999, c. 24 [hereinafter Framework Agreement].

[21] Agreements on police services, administration of justice, liquor licenses and combat sports.

[22] Agreements on registration of birth, marriage and death; agreements on child care services.

[23] Agreements on economic development, transportation and right of user: agreements on taxes for goods and services, tobacco, fuel and liquor.

[24] Federal Bill C-9, *An Act to give effect to the Nisga'a Final Agreement,* 2d Sess., 36th Parl., 1999 (First reading 13 December 1999).

[25] *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada,* confirmed with Federal Bill C-39, *An Act to amend the Nunavut Act and the Constitution Act, 1867,* S.C. 1998, c. 15.

[26] This is because the requirements for recognizing the land management powers of Band Councils pursuant to *An Act providing for the ratification and bringing into effect of the Framework Agreement on First Nation Land Management,*

supra note 20, in terms of adopting standards, notably for capital disposal, a practice unknown to Aboriginals, amount to a concession in exchange that is almost as significant as the cancellation of tax exemptions.

[27] See "Intégration des valeurs", See our article *supra* note 16.

[28] Based on statements by B. Watts, Assistant Deputy Minister of Aboriginal Affairs, during the United Nations *Working Group on Indigenous Populations* in Geneva, 16th Sess., 28 July 1998: "Review of the Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous People".

[29] See *results of our interviews reported in the article mentioned* "Intégation des valeurs", *supra* note 16.

[30] Especially in *Delgamuukw, supra* note 19.

[31] On narrativity, see among others: I. S. Papadopoulos, "Guerre et paix en droit et littérature", (1999) 42 *Revue interdisciplinaire d'études juridiques* 181-196 (Brussels); R. Delgado, "Storytelling for Oppositionists and Others: a plea for narrative", (1989) 87 *Mich. L. Rev.* 2411; and "Shadowboxing: an essay on power", (1992) 77 *Cornell L. Rev.* 813.

[32] See: I. Duplessis, "Quand les histoires se font globales: l'exemple de l'internationalisation des revendications autochtones", *Droit et Cultures,* [forthcoming in Droit et Cultures in November 2000].

[33] C. Perelman, in cooperation with P. Foriers, *La motivation des décisions de justice*, (Brussels: Établissements Émile Bruylant, 1978).

QUESTIONING CANADA'S TITLE TO LAND: THE RULE OF LAW, ABORIGINAL PEOPLES AND COLONIALISM

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Does Canada have underlying title to its territorial land base? Does it have exclusive sovereignty throughout the so-called Dominion? These presumptions are questionable when one examines the most fundamental principles underlying the Canadian concept of the rule of law. Furthermore, from an Aboriginal legal perspective, Canada does not have underlying title or overarching sovereignty in traditional Aboriginal territories. Canadian courts have not explicitly explored the rule of law or Aboriginal perspectives on the question of Crown sovereignty and title. They have uncritically acquiesced to Crown proclamations that sovereignty and underlying title to land throughout the country belongs to Canada. Yet the courts' articulation of the rule of law in other contexts, and Aboriginal viewpoints on this matter, do not support the Crown's conclusion.

A faithful application of the rule of law to the Crown's assertion of title throughout the country would suggest that Aboriginal peoples[1] enjoy the very right the Crown claims. Canada's highest court has interpreted the rule of law as being "supreme over officials of the government as well as private individuals, and thereby preclusive of arbitrary power".[2] The Supreme Court has also written that the rule of law requires "the creation and maintenance of an actual order of positive laws, which preserves and embodies the more general principle of normative order".[3] When one examines Canada's assumption of underlying title and sovereignty throughout its claimed territory it is apparent that this presumption violates both fundamental principles of the rule of law. The Crown's claims are arbitrary, in that Canada substantially invalidated Aboriginal peoples territorial rights without informed consent, or persuasive legal explanation.[4] Doctrines of discovery,[5] *terra nullius*,[6] conquest,[7] and adverse possession[8] have all been discredited in the common law and international legal systems as legitimate bases to dispossess Aboriginal peoples of their land.[9] Furthermore, Canada's declaration of sovereignty over Aboriginal peoples violates the second principle of the rule of law, because in the process of such a declaration the Crown suppressed Aboriginal governance and denied these groups indispensable elements of law and order.[10] The repression of Aboriginal powers of governance in the creation of Canada is therefore contrary to the second principle of the rule of law because it destroys normative order within Aboriginal communities.

Yet the rule of law is not the only paradigm violated in the way that Canada has dealt with Aboriginal rights. Aboriginal perspectives, in most corners of the country, are equally strong in challenging the Crown's supposed overarching sovereignty and underlying title.[11] Quite simply, Indigenous perspectives ask the Crown to produce evidence to prove that Aboriginal peoples ever consented to the wholesale transfer of their governance over and radical interest in land.[12] The Canadian governments and the courts have not produced compelling evidence to persuade Aboriginal people in this regard.[13] The treaty process, which might be one place where some say the Crown acquired these interests, has been shown to be deeply flawed. In almost every treaty negotiation, one can detect dishonesty, trickery, deception, fraud, prevarication, and unconscionable behaviour on the part of the Crown in attempting to acquire its interest.[14] In most treaties, there was no consensus or "meeting of the minds" on the question of the Crown receiving sovereignty or underlying title to the land from Aboriginal peoples.[15] Moreover, there are many parts of Canada where the Crown has never negotiated with Aboriginal peoples to receive a transfer of any rights to land or governance.[16] The Crown has merely asserted such rights, and acted as if these unilateral declarations had legal meaning. Most

Aboriginal peoples regard the Crown's assertion and actions in this regard as being the gravest injustice ever perpetrated upon them. They contend that no words by governments or courts can dispossess them of their land or governing powers unless they agree to surrender these rights with adequate knowledge and informed consent.

This paper examines how the rule of law as articulated by Canadian courts could be used to question Canada's claim to underlying title and sovereignty in Canada. Furthermore, it suggests that such a process is necessary for Canada to abide by its most valued precepts as "a free and democratic society".[17] This would also enable the country to overcome its colonial treatment of Aboriginal peoples in contemporary Canada, and would be consistent with Aboriginal perspectives skeptical of Crown assertions. One cannot found a truly just country on stolen land and repressive government. Many people might think that there is some persuasive justification for the displacement of Aboriginal peoples that can be articulated in law. This is not the case. Aboriginal peoples have by and large been illegally and illegitimately forced to diminish their claims to land and government because of the arbitrary actions of non-Aboriginal governments.[18] This is an issue of justice that directly implicates the rule of law.

While most people in Canada may be comfortable with the state of the nation, this might be because there is little recognition or concern that it is built upon a deeply troubling relationship with the land's original owners and governors. Many Canadians may think that since their experience of life in Canada is one of fairness and justice, that most people experience life in Canada in this same way.[19] However, Canada is a country that does not have an "even" experience of justice.[20] Aboriginal peoples have been denied essential legal rights in property (title)[21] and contract law (treaties)[22] that lie at the heart of our private law ordering.[23] This should be of concern to all Canadians, since a failure of the rule of law in this quarter presents a threat to the very fabric of our fundamental principles of order. If the rule of law cannot be relied upon to overcome political and economic exploitation in the circumstances of Aboriginal peoples, what assurances do we have that the maintenance rule of law will not be equally vulnerable in other situations involving non-Aboriginal Canadians? Aboriginal peoples might function like the miner's canary. When the most vulnerable among us suffer from the toxins present in our legal environment, this serves as an important warning about the health of the rest of our legal climate. The rights and freedoms protected by the rule of law can be very fragile, and we must take care that an unraveling in one area does not become more generalized and work to undermine an entire society.

The notion that Aboriginal peoples should enjoy the full benefits of the rule of law however might be thought by some to precipitate the very problem that I am cautioning against. It may be said that recognition of underlying Aboriginal title to lands in Canada, and co-equal sovereign powers between Aboriginal peoples and the Crown would work to completely undermine Canadian society. Some may argue that past wrongs cannot be fully addressed because too much in the present relies upon these prior violations and indiscretions.[24] I have no hesitancy recognizing that a shift of this magnitude would cause significant disruption for many people. Many people are being unjustly enriched through the failure of the rule of law for Aboriginal peoples, and will not easily give up their accoutrements and power. The struggle over these endowments will not occur without severe strain to our institutions. The full application of the rule of law to Aboriginal peoples would necessarily change our political system and national economy to thoroughly accommodate Aboriginal peoples within a new national framework. Nevertheless, serious disruptions to our socio-political relations is not the same thing as completely undermining these same relations, especially when the correction of injustice to Aboriginal peoples may ultimately set the entire society on the path to a more peaceful and productive future.

A house built upon a foundation of sand is unstable, no matter how beautiful it may look and how many people may rely upon it. It would be better to lift the house and place it on a firmer foundation, even if this would create some real challenges for people in the house. Ultimately, this would benefit all within the house, by prolonging the life of the structure and creating benefits for its inhabitants for generations beyond what would be possible if it collapsed because of its unsupported weight. Canada is built on a foundation of sand, as long as the rule of law is not consistently applied to Aboriginal peoples. This country must be placed on a firmer legal foundation by extending the full benefits of legal ordering to its original inhabitants. While the recognition of underlying Aboriginal title in Canada, and the affirmation of co-equal sovereignty would cause severe disruptions in our social and economic fabric, it would ultimately set us on a more stable, secure foundation. This would present greater opportunities for Canadians, over the longer term, by correcting the imperfections of our present ordering. This paper is written with the understanding that the rule of law can be more than a hollow phrase used by those who want to govern others to accomplish their own purposes.[25] It is motivated by the very conservative notion that the consistent application of the rule of law can be an important bulwark against arbitrariness and oppression. This is a notion that should concern all Canadians, as we all rely on the same legal structure to protect our dignity and relationships.

The Rule of Law in Canada

Aristotle observed that "rightly constituted laws should be the final sovereign" in any just political community.[26] He argued that the rule of law (*dikaiosyne*) is preferable to personal rule because law better distributes and combines moral virtue and important legal customs to make the members of a state just and good (*nomos*). The sovereignty of law could be threatened if "the law itself had a bias in favour of one class or another", or the laws were "in accordance with wrong or perverted constitutions".[27] Failure to question the Crown's assertions of underlying title and sovereignty (while strictly scrutinizing Aboriginal assertions) appears to create a bias in the law in favour of non-Aboriginal groups who rely on Crown assertions in Canada. This approach is not consistent with the rule of law. It upholds personal rule to the detriment of Aboriginal peoples and to the advantage of non-

Aboriginal people. The courts' failure to interrogate Crown sovereignty does not therefore distribute legal customs in a just manner.[28] This perverts Canada's Constitution that proclaims "Canada is founded upon principles that recognize the supremacy of God and the rule of law".[29] Failure to question personal rule is not consistent with section 52(1) of the Constitution that states that it is "the supreme law of Canada".

Courts in Canada do not respect the supremacy of the rule of law in the Constitution when they unquestioningly support notions of underlying Crown title and sovereignty. This is not the court's approach in other circumstances. In the *Manitoba Language Reference*, a case involving the constitutionality of the laws throughout the province of Manitoba, the Supreme Court of Canada questioned the actions of the Manitoba Crown and legislature. The Court used this opportunity to affirm the supremacy of law over the government, and wrote:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in…s. 52 of the *Constitution Act*, 1982, that this court must find the unconstitutional laws of Manitoba to be invalid and of no force or effect…[30]

The Court characterized the province's action in not translating its laws into French, as required in Manitoba's terms of union, as a blunt exercise of arbitrary power. It therefore drew upon the paramountcy of law to declare the province's entire statutory code invalid because of its failure to incorporate a fundamental respect for the rule of law in the laws' passage.[31] This result demonstrates that the "rule of law constitutes an implied limit on the legislative jurisdiction of Parliament and the provincial legislatures, and that legislation inconsistent with the rule of law will therefore be held to be *ultra vires*".[32] It shows that the courts will not sanction an exercise of arbitrary power that does not conform to the principles consistent with the rule of law. Aboriginal perspectives hold that the Crown's assertion of sovereignty depriving Aboriginal people of underlying title and overriding self-government is also a blunt exercise of arbitrary power. It is arbitrary because democratic principles of consultation and consent were not followed.[33] It is arbitrary in the sense that this power has been exercised at the sole discretion of non-Aboriginal governments without the participation or agreement of the land's original inhabitants, and has resulted in the virtual devastation of their territories and communities.[34]

"The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so".[35] Aboriginal peoples have had their status redefined by Canada without sound juridical reasons. There is little that could be more arbitrary than one nation substantially invalidating politically distinct peoples' rights merely because that nation says it is so – all without an elementally persuasive legal explanation. The Court has not effectively articulated how (and by what legal right) assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance.[36] The Crown's claim to possess land not their own is wholly unsubstantiated by the physical reality at the time of their so-called assertions of sovereignty.[37] Its supposed right to exercise dominion over Indigenous peoples does not accord with the factual circumstances at the time of contact.[38] These "vague" and "unintelligible" propositions "do not make sense" under the rule of law because they are factually untrue, and lack legal cohesion.[39] The Crown's assertion of sovereignty diminishing Aboriginal entitlements is therefore arbitrary in the sense that at its core it has been done without coherent reasons. As a result, the assertion of Crown sovereignty over Aboriginal peoples in Canada violates the first principle of the rule of law and is unconstitutional.

The unquestioned assertion of Crown sovereignty also violates the second principle of the rule of law: the sustenance of normative legal order through the production and preservation of positive laws. Crown sovereignty has been interpreted in such a manner as to stifle Aboriginal governments in the creation and maintenance of laws supportive of normative order. The

Supreme Court, again in the *Manitoba Language Reference*, described this second aspect of the rule of law in the following terms:

> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. …As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl Zeiss-Stiftung v. Rayner & Keeler Ltd.*, [1966] 2 All E.R. 536 (H.L.) at p. 577. According to Wade and Philips, Constitutional Administrative Law, 9th ed. (1977), at p. 89:
>
> > …the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.[40]

The failure to recognize and affirm the positive and customary Aboriginal laws of Aboriginal governments, which preserves and embodies more general principles of their ancient normative orders, has lead to near-anarchy and constant strife within Aboriginal communities. One only has to be vaguely familiar with the encumbrances Aboriginal government's function within to appreciate this fact. Aboriginal communities have greatly suffered because their governments have been oppressed.[41] The Crown's suppression of Aboriginal governance denies Aboriginal groups indispensable elements of law and order. It displaces Aboriginal peoples "purposive ordering of social relations providing a basis upon which an actual [contemporary, culturally appropriate and effective] order of positive laws can be brought into existence".[42] How there is any justification for the denial of Aboriginal sovereignty, as the *Reference* implies, "is a mystery in politics, inconceivable to human capacity and inconsistent with human society".[43] The repression of Aboriginal powers of governance is therefore contrary to the second principle of the rule of law because it destroys the normative orderliness within Aboriginal communities.

However, despite the disorder imposed on Aboriginal peoples by the assertion of Crown sovereignty, some would argue that the second principle of the rule of law must also consider the potential "chaos and anarchy" if the Crown's assertion was held to be invalid, and of no legal force and effect. The court would not tolerate a legal vacuum,[44] nor would it tolerate a province being without a valid and effectual legal system.[45] Since the Constitution would not suffer any province without laws, the Constitution would require that temporary validity, force and effect be given to those rights, obligations and other effects that have arisen under those laws until such time as the problem, which led to the invalidity, could be corrected.[46] In other words, despite the invalidity of Canada's laws (under the first principle of the rule of law because of their being built on an arbitrary non-legal foundation – the tautology of Crown assertions of sovereignty), the second principle of the rule of law would require: 1) that Aboriginal normative orders be facilitated by recognizing their powers of governance, and 2) that the province's laws continue in effect until the parties correct the invalidity by grounding Crown title and sovereignty on a sound, substantiated legal foundation. Therefore, the next time the court considers Aboriginal self-government in Canada, the second principle of the rule of law would require a recognition of Aboriginal self-governments to enable these communities to maintain and create law and order. It would further require that the court declare Canada's invalid laws operative until they can be fixed by the federal Crown negotiating with First Nations to place Crown sovereignty in a workable, proper legal network.[47]

Courts and the Questioning of Crown Sovereignty

In suggesting that the Court interrogate Crown assertions of sovereignty a central question remains – are the courts permitted to engage in such an inquiry? The answer is yes, Canadian courts are not prevented from "reviewing the manner in which the Sovereign acquires new territory" in cases dealing with Aboriginal title.[48] The "Act of State" doctrine, which deals with this issue, was examined by the Supreme Court of Canada in the groundbreaking case of *Calder v. A.G.B.C.* and found not to apply. Justice Hall gave two reasons why it was inappropriate to extend the Act of State doctrine to cases dealing with Aboriginal title. First, "it has never been invoked in claims dependent on aboriginal title",[49] and, therefore, a finding that the Act of State doctrine applied to cases dealing with Aboriginal title would be unprecedented and unsupported by the jurisprudence. Second, the Act of State doctrine only deals with situations where a "Sovereign, in dealings with another Sovereign (by treaty or conquest) acquires land".[50] In most places throughout Canada the Crown did not acquire underlying title land by a treaty or conquest, and therefore this doctrine would have no application in examining assertions of Crown sovereignty.[51] As such, the Courts would be permitted to review the effects of the Crown assertion of sovereignty over Aboriginal peoples in Canada.

In fact, such oversight of the proper conduct of the other branches of government is required by the independence of the court as an institution, and of the judiciary as individuals within this institution.[52] Judicial independence has been guaranteed for centuries and is a cornerstone of English and Canadian constitutionalism.[53] Canadian courts are separate and autonomous from the Crown and the legislature, and do not function as the servants of the Queen or Parliament.[54] They administer the rule of law that is "superior and antecedent not only to legislation and judicial decisions but also to the written constitution".[55] The British Columbia Court of Appeal noted *in The B.C. Government Employees Union v. B.C. (A.G.):*

> It must be noted that judicial independence was won in England after centuries of struggle with the executive and legislative branches of government. It was finally established in 1701 by the *Act of Settlement*...when tenure for the judges was established.
>
> As Sir William Holdsworth, the distinguished British legal historian has said in a *History of English Law*:

> The judiciary has separate and autonomous power just as truly as the King or Parliament; and in the exercise of these powers, its members are not more in the position of servants than the King or Parliament in the exercise of their powers... The judges have powers of this nature, being entrusted with the maintenance of the supremacy of law, they are and have long been regarded as a separate and independent part of the Constitution.[56]

Judicial independence and the supremacy of law ensures that courts are free to question the actions of the other branches of government if the law requires it when an action is brought before them.[57] Presumably, this means that the courts would be permitted to scrutinize Crown assertions of sovereignty and find them invalid if such professions did not comply with the rule of law.[58] As such, the court, as an independent body, would not be disallowed from finding that the laws of Canada or any province, relating to Aboriginal lands and governance, are beyond the reach of the Crown or Parliament, if they do not comply with the rule of law as expressed in the Constitution's principles or provisions.[59] To be more specific, if the court found that the Crown did not comply with the law in gaining underlying title and overriding sovereignty in Canada it would have to hold that such assertions were "of no legal force or effect" until the parties created a supportable legal framework.[60]

Readers may question whether individual judges would ever declare invalid the assertion of Crown sovereignty in any part of the country, despite it legally being an institutional possibility. There would be an enormous temptation to do everything possible to avoid such an outcome because of the enormous stakes involved in such a decision. After all, it may be asked, who would respect the law and the judiciary if they arrived at this conclusion? It could be said that too many people throughout Canada would be displaced and subject to immense suffering. Most would consider such a decision unreasonable, impractical, unrealistic, and unsound, lacking knowledge of the law or history surrounding Aboriginal rights. Since very few people would probably understand the court's justification for such a decision, there may be real concerns about whether such a declaration would bring the administration of justice into disrepute.

Yet, doesn't this line of inquiry only look at the issue from one side? Aboriginal people and others who are puzzled by the wide effect of Crown assertions might develop a greater respect for the judiciary if the courts ruled according to principles of law. They would consider such a conclusion reasonable, practical, realistic and sensible, understanding the law and history surrounding Aboriginal rights. They would see that such a decision could help reduce the suffering of Aboriginal peoples that comes from their alienation from land and governance. Such a decision may even enhance the reputation of the administration of justice as the court applies the law in accordance with its highest principles. The courts' questioning of Crown assertions of sovereignty would be a substantial development of Canada's legal order. It would highlight the guarantee to every Canadian of an impartial and independent judiciary, which has been described as "the most important benefit of civilization".[61]

Therefore, despite the challenges a judge may encounter in questioning assertions of Crown sovereignty, the criteria that must be used to arrive at such a decision cannot be based on a numeric tally of public opinion.[62] The judiciary is independent.[63] Conclusions must be legally expressed. It is not appropriate for a judge to use their power in any other way. While most judges would no doubt struggle with a ruling suspending the negative effects on Aboriginal peoples of assertions of Crown sovereignty, if they were led to such a conclusion and did not rule it was so, the very integrity of the Canadian legal fabric would be undermined.[64] If the judiciary is to take the Constitution, the rule of law and their own office seriously, judicial independence mandates "impartial and disinterested umpires".[65] As such, any judge who reviewed the assertion of sovereignty over Aboriginal peoples would be expected to do so in an impartial manner,[66] without bias or a predisposition as to the result.[67] The fair and equitable application of law demands strict adherence to this standard.[68]

Unwritten Traditions, the Constitution, and the Rule of Law

The exclusive authority Canada has given itself to extinguish and/or diminish the distinct rights of Aboriginal people, without their consent, raises the question of how this can be constitutionally justified. In order to be legally valid and politically legitimate, Canada's claim must be congruent with broader constitutional principles. In the *Quebec Secession Reference* case, the Supreme Court of Canada identified some of these principles when ruling that a unilateral declaration of sovereignty by Quebec would be unconstitutional.[69] The Court observed that in the Canadian "constitutional tradition, legality and legitimacy are linked".[70] Any consideration of the diminishment of Aboriginal rights should therefore review these broader legal principles to assess the legitimacy of the Crown's assertion of sovereignty in Canada. The need for this wide examination is suggested by the entrenchment of Aboriginal rights in the Constitution. As the Supreme Court observed in the leading case of R. *v. Sparrow:*

> Section 35 calls for a just settlement for Aboriginal peoples. It renounces the old rules of the game under which the Courts established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[71]

When courts exercise the authority given to them to question sovereign claims made by the Crown, they must look at the entirety of the Canadian constitutional law framework. As the Court counselled in the *Quebec Secession Reference*, their review must look to an oral tradition, "behind the written word", which is "an historical lineage stretching back through the ages which aids in the consideration of the underlying constitutional issues".[72] The legality and legitimacy of the law dealing with Aboriginal peoples depend on these "fundamental and organizing principles",[73] which "are the vital unstated assumptions upon which the text is based".[74] These unstated precepts, which "inform and sustain the [Canadian] constitutional text" are two-pronged. They can be drawn from the oral traditions of Aboriginal peoples throughout this country,[75] and they can be sourced in the oral traditions of the Western legal tradition.[76] The courts unfortunately have not deeply examined how Aboriginal oral traditions, laws and perspectives would inform and sustain the constitutional text.[77] However, Canadian courts have examined how the underlying traditions of Western law influence Canada's constitutional text.

In the *Quebec Secession Reference,* the Supreme Court of Canada identified the fundamental traditions influencing the interpretation of Canada's constitutional text. The Court categorized these traditions as federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[78] The Court described these precepts as “underlying constitutional principles” that “may in certain circumstances give rise to substantive legal obligations which constitute substantive limitations upon government action.”[79] The question for this section of the paper is what would these four constitutional principles sustain, when considered together,[80] relative to the legality and legitimacy of the extinguishment of Aboriginal rights prior to 1982, and their justifiable infringement subsequent to 1982? A brief examination of each doctrine reveals that Aboriginal peoples can interrogate and overturn assertion of Crown sovereignty that permit the unilateral extinguishment and diminishment of Aboriginal rights.

The first principle the Supreme Court considers in the *Quebec Secession Reference*, which is helpful in assessing the legality and legitimacy of the treatment of Aboriginal peoples, is federalism. In discussing federalism, the Supreme Court wrote that the federal system is only partially complete “according to the precise terms of the *Constitution Act 1867*”[81] because the “federal government retained sweeping powers that threatened to undermine the autonomy of the provinces”.[82] A simple reading of the *Constitution Act 1867* confirms the notion that the federal government appeared to secure the paramount legislative authority over the province in Canada.[83] Thus, the unbalanced structure of the document led the Court to write that: since “the written provisions of the Constitution do not provide the entire picture” of the Canadian federal structure, the courts have had to “control the limits of the respective sovereignties”.[84] This reorientation of the original words was necessary to facilitate "democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective", having regard to the diversity of the component parts of Confederation.[85] This has resulted in the sharing of political power in Canada between two orders of government – the provinces and the central government.[86] Provincial power has been significantly strengthened under this interpretation.[87]

Applying the principles of federalism to Aboriginal peoples, would it not be possible to also regard the federal system as only partially complete as regards to Aboriginal peoples?[88] Could it not be similarly analogously argued, that the "federal government retained sweeping powers" relative to Aboriginal peoples "which threatened to undermine the autonomy" of these groups?[89] Furthermore, since the "written provisions of the Constitution do not provide the entire picture" relative to Aboriginal peoples, could not the courts also "control the limits of the respective sovereignties" by distributing power to the Aboriginal government "thought to be most suited to achieving a particular societal objective"? If the courts can draw on unwritten principles of federalism to fill in the "gaps in the express terms of the constitutional text"[90] to strengthen provincial powers, why can they not do the same thing to "facilitate the pursuit of collective goals by cultural and linguistic minorities"[91] which comprise Aboriginal nations? Following the Court's reasoning, the principle of federalism could be applied to question assertions of sovereignty that purportedly diminish Aboriginal powers. This would allow Aboriginal people to function as an equal integral part of the federal structure in Canada.

The next principle the courts could consider, in assessing the legality and legitimacy of the treatment of Aboriginal peoples, is democracy. In the *Quebec Secession Reference,* the Supreme Court held that "democracy has always informed the design of our constitutional structure and continues to act as an essential interpretive consideration today".[92] They said that democracy "can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated".[93] The Court's notion of democracy in their opinion includes the ideas of majority rule,[94] the promotion of self-government and the accommodation of cultural and group identities,[95] the popular franchise,[96] and the consent of the governed.[97] Canada has not followed these principles of democracy in its dealings with Aboriginal peoples. First, the unilateral attempt to extinguish Aboriginal rights and the subsequent denial of a legal right to question this action do not advance majority rule and secure the popular franchise. For example, Aboriginal peoples were in the majority in most parts of the country at the time their rights were purportedly extinguished, and they were later denied the political and legal means to challenge the Crown's actions.[98] Second, the Crown's assumption of overarching sovereignty does not promote community self-government nor does it accommodate Aboriginal identities. For example, Aboriginal governments were over-lain by elected *Indian Act* governments and Aboriginal individuals were subjected to ruthless assimilation policies.[99] Finally, the denial of underlying Aboriginal title and the equality of Aboriginal sovereignty do not secure the consent of the governed. For example, Aboriginal peoples in each province and every single community have consistently resisted the extinguishment and diminishment of their rights by the Crown.[100] The application of the ideas of democracy underlying Canada's Constitution leads one to question whether the assertion of Crown sovereignty was a legally valid or a legitimately effective exercise of power when it adversely effected Aboriginal rights.

In principles integral to democratic rule, Canada has not created a legitimate framework or legal foundation upon which to build an appropriate relationship with Aboriginal peoples. Its system of government has not identified and implemented a system that reflects the aspirations of Aboriginal peoples. This represents a failure of democracy for these groups, and therefore for Canada as a whole. As the Court observed:

> It is the law which creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest,

> ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to law alone. A political system must also possess legitimacy, and in our democracy that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure.[101]

As this quote implies, the Canadian Constitution must create a "framework" for, and a "legal foundation" upon which to build Aboriginal groups' participation in federal structures. Aboriginal peoples throughout Canada have never had the opportunity to participate as traditional governments in the federal structure and have not been a part of this "framework". Legally, this exclusion is most profound when it includes the Crown's extinguishment and infringement of Aboriginal rights without requisite consent. Morally, this exclusion is most repugnant when the assumption of extinguishment and infringement carries with it the germs of forced integration, assimilation and cultural genocide. For many Aboriginal peoples extinguishment is genocide.[102] This is not a morally legitimate framework to embed in Canada's constitutional structure; the principle of democracy does not sanction such treatment.

The third principle the courts could examine, in determining the legality and legitimacy of Crown assertions relative to Aboriginal peoples, is the rule of law. While this principle has been discussed above, it is worth observing that the rule of law must be placed beside federalism and democracy when considering the dispossession Aboriginal people face through the Crown's assertion of underlying title and overarching sovereignty. In the *Quebec Secession Reference,* the Court observed that "at its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs".[103] The pre-82 unilateral extinguishment of Aboriginal rights, and the post-82 infringement of the same does not ensure a predictable and ordered society because it severely disrupts Aboriginal nations and causes deep-rooted resentment against the federal government.[104] This resentment is translated into strained adversarial relations, periodic blockades and endless litigation. It tears apart the fabric of Aboriginal communities,[105] and leads to instability within the larger population by reducing investment, creating social tension, and causing uncertainty.[106] The consequences of this resentment could further deteriorate and lead to dissension and violence if left unattended. If the situation between Aboriginal peoples and others ever degenerates to the point of frequent, chronic violence, it must be recognized that the doctrine of non-consensual Crown actions relative to Aboriginal peoples could be considered one of the background causes to such distress. Such conditions would have to be partially attributed to the failure to fully extend the rule of law to Aboriginal peoples.

The failure to allow the rule of law to be enjoyed by Aboriginal peoples has already affected them in at least three profound ways. This has already led to violence, though its effects have largely been contained within Aboriginal communities. First, there were few safeguards for the fundamental human rights and individual freedoms of Aboriginal peoples for most of Canada's history.[107] This resulted in their individual and collective lives being unduly "susceptible to government interference".[108] This interference is evidenced through the suppression of government,[109] the denial of land,[110] the forced taking of children,[111] the criminalization of economic pursuits,[112] and the negation of the rights of religious freedom,[113] association,[114] due process[115] and equality.[116] Second, in the creation of Canada, the parties did not ensure that, as a vulnerable group, Aboriginal peoples were "endowed with institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority".[117] This led to further vulnerability and violence, as Aboriginal peoples were not extended the institutional means to resist the violation of their rights.[118] And third, the political organization of Canada did not "provide for a division of political power" which prevented the provincial and federal governments from usurping the powers of Aboriginal governments. As such, non-Aboriginal governments usurped Aboriginal authority "simply by exercising their legislative power to allocate additional political power to itself unilaterally".[119] This enabled these governments to unjustly enrich themselves at the expense of Aboriginal peoples. These transgressions of the rule of law illustrate the problems of founding a country without dealing justly with its original inhabitants. It does not produce a stable, ordered and predictable society. In this area, it does not create a nation one can be proud of. The courts must not sanction the continued violation of the rule of law in Canada relative to Aboriginal peoples.

Fourth, and finally, in considering the legality and legitimacy of constitutional principles that relate to the diminishment of Aboriginal rights, it should be recalled that the Court in the *Quebec Secession Reference* held that "the protection of minority rights is itself an independent part of the Constitution".[120] Aboriginal title and sovereignty must not be unilaterally subject to Crown title and sovereignty because this would fail to protect Aboriginal peoples from the majority in Canada. The application of an unencumbered right of Crown sovereignty over Aboriginal peoples could also defeat the "promise" of section 35 which "recognized not only the ancient occupation of land by Aboriginal peoples, but their contributions to the building of Canada, and the special commitments made to them by successive governments".[121] Crown claims, that they can extinguish Aboriginal rights on their authority alone, does not seem consistent with the Court's observation that "the protection of minority rights was clearly an essential consideration in the design of our constitutional structure".[122] One wonders, if the positions were reversed, how Canadians would respond if Aboriginal peoples were vested with the exclusive power to extinguish non-Aboriginal rights. It is likely they would want to be protected in such circumstances. The courts, in one of their roles as a counter-majoritarian body, should ever be mindful of the challenges faced by peoples who are in a minority situation in Canada, and act to protect their rights from unfair occlusion.

The courts must combine the principles of federalism, democracy, the rule of law and the protection of minorities to assess the legality and legitimacy of Canada's assertions over

Aboriginal peoples. If the courts agree with the conclusions suggested by this article, then Canada's laws should be declared invalid, though enforceable, by the application of the rule of law until the parties resolve this situation through negotiation. Until this is resolved, Aboriginal peoples will continue to critique the unjust application of Canadian law to their societies. If this is not resolved through law and negotiation, Aboriginal peoples may one day claim a right to be freed from a situation that denies them the fundamental guarantees of the rule of law.

Conclusion: The Rule of Law and Self-Determination

This article has illustrated how the Crown's assertion and the Court's acceptance of a subsequent claimant's non-consensual assertion of rights over a prior owner's land is not consistent with the law's highest principles. Any judicial sanction of the colonization, subjugation, domination and exploitation of Aboriginal peoples in Canada is not a "morally and politically morally defensible conception of Aboriginal rights".[123] It "perpetuates historical injustice suffered by Aboriginal peoples at the hands of the colonizers",[124] and is illegitimate and illegal. In such situations, the Supreme Court has held that this treatment may ultimately raise a claim of a legal right to self-determination for those who suffer such abuses, if this treatment is not ended through negotiation and reconciliation. Aboriginal self-determination must receive negotiated expression within Canada through an appropriate extension of the rule of law in matters of federalism, democracy and minority protection.

Otherwise, one might properly regard the Crown's treatment of Aboriginal peoples as "colonial rule", which leads to their "subjugation, domination and exploitation", and blocks their "meaningful exercise of self-determination".[125] In commenting on the implications of obstructing self-determination, the Supreme Court, in the *Quebec Secession Reference,* observed that external self-determination can be claimed in three circumstances:

> …the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[126]

Aboriginal peoples may have an argument for self-determination on the authority of these principles if the Crown's assertion of sovereignty is not tempered in ways suggested in this article. If this does not occur, Aboriginal peoples may be able to argue that they are colonial peoples, "inherently distinct from the colonialist power and the occupant power. This would allow them to assert that their 'territorial integrity', all but destroyed by the colonialist or occupying power, should be fully restored."[127] Furthermore, Aboriginal people may be able to claim the legal right to self-determination by arguing that Canada's diminishment and extinguishment of their rights has not "promoted…the realization of the principles of equal rights and self-determination of peoples…bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of friendly relations], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations."[128] Finally, Aboriginal people may claim the right to self-determination because the unilateral extinguishment of the rights prior to 1982, and their continued "blocking" from questioning this injustice means the Canadian government does not represent "the whole people belonging to the territory without distinction of any kind".[129]

If Aboriginal peoples were able to show the force of any one of the arguments developed in this article, and establish that they were entitled to the legal right of self-determination, this could take them a great distance in undoing the injustice of Crown sovereignty. Each party needs to more fully explore these issues and subsequently negotiate and reconcile them through joint effort.

REFERENCE NOTES

[1] Aboriginal in Canadian law includes Indian, Inuit and Metis people: see s. 35(2) of the *Constitution Act, 1982* (Canada), enacted as Schedule B to the *Canada Act*, 1982 (U.K.), c. 11 [hereinafter *Constitution Act*, 1982].

[2] *Reference Re Language Rights Under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at 22 [hereinafter *Manitoba Reference Case*].

[3] *Ibid.* at 22-23.

[4] The Royal Commission on Aboriginal Peoples was initiated in the months following the failure of Constitutional reform in the Meech Lake Accord in 1987 and the armed confrontation between the Mohawks and the Canadian State at Oka, Quebec in 1990. It was established on August 26, 1991 and issued its final report five years later in November 1996. The mandate of the Commission was to "investigate the evolution of the relationship between aboriginal peoples…the Canadian government, and Canadian society as a whole." Furthermore, the Commission was asked to "propose specific solutions rooted in domestic and international experience, to the problems that have plagued those relationships…", Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward and Looking Back* , vol. 1 (Ottawa: Supply and Services Canada, 1996) at 2 [hereinafter *Looking Forward and Looking Back*]. One of its foundational recommendations, which it regarded as central to constructing a better relationship between Aboriginal peoples and the Crown, was for Canadian governments to acknowledge the lack of legal or moral justification for the dispossession of Aboriginal peoples in Canada. See recommendation 1.16.2 at page 696:

> Federal, provincial and territorial government further the process of renewal by:
> (a) acknowledging that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong.

[5] *Island of Palmas Case United States* v. *Netherlands* (1928), 2 R.I.A.A. 829 (a claim based on discovery is incomplete until accompanied by the effective occupation of the region claimed to be discovered); *Western Sahara Case*, [1975] I.C.J. Rep. 12 (precludes a region from being termed uninhabited if nomadic or resident tribes with a degree of social or political organization are present in the area).

[6] *Mabo* v. *Queensland* (1992), 107 A.L.R. 129 (Aust. H.C.). Justice Brennan wrote in this case, "the common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius".

[7] *Status of Eastern Greenland Case* (*Denmark* v. *Norway*) (1933), 3 W.C.R. 148 at 171, "[the doctrine of conquest] only operates as a cause of lack of sovereignty when there is a war between two states, and by reason of defeat of one of

them, sovereignty over territory passes from the loser to the victorious state". Piecemeal encroachment on Aboriginal land in Canada does not fit this description.

[8] Adverse possession basically states that you can acquire title to part of another state's land if you occupy it for an extended period of time and the original owner acquiesces to your presence. In order for the claim to be valid there must be a *de facto* sovereignty that is peaceful and unchallenged. Canada did not acquire territory in this way as there has been continual Aboriginal resistance to Crown assertions of possession.

[9] For further discussion, see generally, S. Venne, *Our Elders Understand Our Rights: Exploring International Law Regarding Indigenous Rights* (Penticton, B.C.: Theytus, 1998), J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford, 1996).

[10] *Looking Forward, Looking Back, supra*, note 4 at 245-544.

[11] For these perspectives, see generally, F. Cassidy, ed., *Aboriginal Self-Determination* (Toronto: University of Toronto Press, 1991); B. Richardson, *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) [hereinafter *Drum Beat*]; T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford Press, 1999); P. Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (Halifax: Fernwood, 1999).

[12] For example, the Nisga'a of North-western British Columbia asked in 1887:

> What we don't like about the government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way…The chiefs do not talk foolishly, they know the land is their own…

D. McKay, cited in R. v. *Calder* (1973), 34 D.L.R. (3d) 145 (S.C.C.). For other Aboriginal perspectives questioning Crown title see L. Little Bear, M. Boldt and J. A. Long, eds., *Pathways to Self-Determination; Canadian Indians and the Canadian Nation State* (Toronto: University of Toronto Press, 1984) at 5-56; M. Boldt and J. A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1986) at 17-70; M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), especially at 26-40.

[13] Differences between Aboriginal and Crown interpretations in this regard have been documented in each province and territory in Canada: in British Columbia, see P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: UBC Press, 1990); in Alberta, see R. Price, *The Spirit of Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987); in Saskatchewan, see H. Cardinal, *My*

Dream: That We Will One Day Be Recognized as First Nations (Saskatoon: Office of the Treaty Commissioner, 1998); in Manitoba, see P. Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991); in Ontario, see D. McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario* (Waterloo: Wilfrid Laurier Press, 1999); in Quebec, see Grand Council of the Crees (of Quebec), *Sovereign Injustice* (Emaska, Quebec: Grand Council of the Crees, 1995); in New Brunswick, Nova Scotia and Prince Edward Island, see L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes* (Vancouver: UBC Press, 1979); in Newfoundland, see D. McCrae, *Report of the Complaints of the Innu of Labrador to the Canadian Human Rights Commission* (Ottawa: Supply and Services, 1993); in the North, see Royal Commission on Aboriginal Peoples, *The High Arctic Relocation* (Ottawa: Supply and Services, 1994).

[14] A close examination of the numbered treaties covering Alberta, Saskatchewan, Manitoba, and North and Western Ontario shows many problems of deception and dishonesty; see Treaty 7 Elders and Tribal Council et. al., "Aboriginal and Government Objectives in the Treaty Era" in *The True Spirit and Intent of Treaty 7* (Montreal: McGill-Queen's Press, 1996), especially at 210-212; R. Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and 11* (Toronto: McClelland and Stewart, 1976). For problems with treaties on Vancouver Island see C. Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Burnaby, B.C.: Talonbooks, 1999). For problems with treaties in Ontario see J. Chute, *The Legacy of Shingwaukonse* (Toronto: University of Toronto Press, 1998) at 137-159, 195-221. For problems with the treaties in Atlantic Canada, see W. Wicken, "Re-examining Mi'kmaq-Acadian Relations 1635-1755 in Sylvie Departie, et. al., in *Vingt ans après, Habitants et marchands : Lectures de l'histoire des XVIIe et XVIIIe siècles canadiens* (Montreal: McGill-Queen's Press, 1998); W. Wicken, "Heard it From my Grandfather: Mi'kmaq Treaty Tradition and the Syliboy Case of 1928" (1995) 44 *U.N.B.L.J.* 146; W. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties (1994) 43 *U.N.B. L. J.* 43.

[15] In fact, in one notable case concerning treaty 11, *Paulette* v. *Register of Titles (No.2)*, the Court held that

> it was almost unbelievable that the Government party could have ever returned from their efforts [to sign a treaty] with any impression but that they had given an assurance in perpetuity to the Indians in their territories that their traditional use of land was not affected.

(1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.); rev'd on other grounds 63 D.L.R. (3d) 1 (N.W.T.C.A.); aff'd on other grounds 72 D.L.R. (3d) 161 (S.C.C.). "

[16] Large portions of British Columbia, Quebec, and the north fit into this category.

[17] Canada is described as a free and democratic society in section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

[18] R. Williams Jr., *The American Indian in Western Legal Thought* (New York: Oxford, 1989); P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992); B. Clark, *Native Liberty-Crown Sovereignty* (Montreal: McGill-Queen's Press, 1990); A.C. Hamilton and C.M. Sinclair, eds., *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) at 130-142; D. Culhane, *The Pleasure of the Crown* (Burnaby, B.C.: Talonbooks, 1998).

[19] For the last four years Canada has been ranked as the number one country in the world on the United Nations Human Development Index. The index, compiled by the United Nations Development Program (UNDP) measures such areas as life expectancy, education, income. However, if Aboriginal peoples in Canada were included as a separate group they would rank 63rd in the world. This gap is one indicator of the disparity that exists between Aboriginal peoples and others in Canada. For a description of the socio-economic challenges Aboriginal peoples face in Canada see Canada, *Report of the Royal Commission on Aboriginal Peoples*; *Renewal: A Twenty Year Commitment*, vol. 5 (Ottawa: Supply and Services, 1996) at 23-54.

[20] *Bridging the Cultural Divide: A Report on Aboriginal Peoples and the Criminal Justice System*, The Royal Commission on Aboriginal Peoples (Ottawa: Supply and Services, 1996). The Supreme Court of Canada in *R.* v. *Gladue* [1999] 1 S.C.R. 688 noted that Canada is in "crisis" with Aboriginal peoples and the justice system.

[21] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

[22] Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

[23] For an affirmation of the importance of property and contractual rights in society see J. W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1998); C. Fried, *Contract As Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1991).

[24] M. Smith, *Our Home or Native Land?* (Vancouver: Stoddart, 1995).

[25] For critiques of the uses of the rule of law in this regard see articles in A. Hutchinson and P. Monahan, eds., *The Rule of Law: Idea or Ideology* (Toronto: Carswell, 1987).

[26] E. Barker, ed., *The Politics of Aristotle* (New York: Oxford University Press, 1958) at 126.

[27] *Ibid.* Throughout the Court's decision in *Delgamuukw* v. *The Queen*, [1997] 3 S.C.R. 1010, the Supreme Court of Canada reveals an internal conflict as it vests final sovereignty in both the Crown and the rule of law. This conflict threatens the sovereignty of law in Canada. The vesting of final sovereignty in the Crown may produce a bias in the law in favour of Canada's non-Aboriginal population which trace their rights to the Crown. This bias could result because aboriginal people do not find their rights rooted in assertions of Crown sovereignty and thus could experience great difficulties in having their entitlements placed on an equal footing with those derived from the Crown. Furthermore, vesting final sovereignty in the Crown may pervert the Constitution which places final sovereignty in the rule of law. If the Crown displaces the rule of law as the final sovereign in Canada this would distort the Constitution's expression concerning the supremacy of the rule of law.

[28] An interesting discussion about the appropriate distribution of legal entitlements between Aboriginal peoples and others in North America is found in P. Macklem, "Distributing Sovereignty: Indian Nations and the Equality of Peoples" (1993) 45 *Stan. L. Rev.* 1311.

[29] *Constitution Act, 1982, supra*, note 1.

[30] *Manitoba Reference Case, supra*, note 2 at 22.

[31] The laws were of no force because they failed to comply with s. 23 of the *Manitoba Act, 1870*, U.K. 32 & 33 Vict. c. 3 (which is part of the Constitution of Canada, *Constitution Act, 1871* U.K. c. 28). The laws of Alberta and Saskatchewan suffered the same defect, see R. v. *Mercure*, [1988] 1 S.C.R. 234; R. v. *Paquette* [1990] 2 S.C.R. 1103.

[32] P. Monahan, *Essentials of Canadian Law: Constitution Law* (Toronto: Irwin Law, 1997) at 128.

[33] All governments entering into confederation came on principles of consultation and consent. Each had the opportunity to make its views known, craft the terms under which they would join the union, and send delegates to these discussions who were representatives of the people, see C. Moore, *1867: How the Fathers Made A Deal* (Toronto: McClelland and Stewart, 1997). Aboriginal peoples, except for the Metis in Manitoba, did not participate in confederation, and were subject to it through the arbitrary acts of others.

[34] The non-recognition of aboriginal title, the creation of small inadequate reserves, the denial of the vote, the passage of anti-potlach laws, the denial of the right to pre-empt land, the replacement of systems of government through

the *Indian Act*, the outlawing of land claims support, the horror of residential schools, and numerous other actions taken as a result of this assertion.

[35] J. Rabin, "Job Security and Due Process: Monitoring Discretion Through A Reasons Requirement" (1976) 44 *U. Chi. L. Rev.* 60 at 77.

[36] As Chief Justice John Marshall of the Unites States Supreme Court observed:

> It is difficult to comprehend the proposition that the inhabitants of the globe could have rightful claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient inhabitants.

Worcester v. *Georgia* 31 U.S. (6 Pet.) 518.

[37] For an insight into Aboriginal possession of land prior to British assertions of sovereignty in Northern North America, see C. Harris and G. Matthews, eds., *Historical Atlas of Canada: From the Beginning to 1800* (Toronto: University of Toronto Press, 1987).

[38] J. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: U.B.C. Press, 1997) at 155-172.

[39] To understand how vagueness and unintelligibility relate to the rule of law see R. v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 643: "A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". How does "crystallization" of aboriginal title, which only assumes what the Crown aims to prove, provide sufficient guidance for legal debate on that title?

[40] *Manitoba Reference Case, supra*, note 2 at 22-23.

[41] A landmark report describing the encumbrances aboriginal governments function within is K. Penner, *Indian Self-Government in Canada: Report of the Special Committee* (Penner Report) (Ottawa: Supply and Services, 1973). Other accessible descriptions are H. Adams, *Prison of Grass: Canada from a Native Point of View* (Toronto: General Publishing, 1975); H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M. Hurtig, 1969) [hereinafter *The Unjust Society*]; J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 1989); *Drum Beat, supra* note 11; B. Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Toronto: Douglas and McIntyre, 1993); S. Weaver: *Making Canadian Indian Policy: The Hidden Agenda, 1968-70* (Toronto: University of Toronto Press, 1981).

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[42] *Manitoba Reference Case*, *supra*, note 2 at 24. For examples of how the Canadian government acted contrary to the rule of law in displacing Aboriginal peoples' own purposive ordering of their own laws and social relations, see "*Looking Forward, Looking Back*", at 137-200, 245-604.

[43] *Manitoba Reference Case*, *supra*, note 2 at 22-23.

[44] *Ibid.*, at 25.

[45] *Ibid.*, at 29.

[46] *Ibid.*, at 37; this rule was expressed as follows:

> All rights, obligations and any other effects which have arisen under the Acts of the Manitoba legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are not saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing these laws. At the termination of the minimum period these rights obligations and other effects will cease to have force and effect, unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. …

[47] In order to enjoy the rule of law, both Aboriginal and non-Aboriginal people must live by legal frameworks that are extensions of themselves. A review of Canada's law and history reveals that Aboriginal peoples have not enjoyed this recognition. Is this a form of despotism? Aboriginal and non-Aboriginal people must be permitted to create structures that recognize the importance of both Aboriginal and Crown sovereignty in Canada. People will find greater dignity in laws that facilitate this objective. Charles Taylor writes:

> In a despotism…the requisite disciplines are maintained by coercion. In order to have a free society, one has to replace this coercion with something else. This can only be a willing identification with the polis on the part of the citizens, a sense that the political institutions in which they live are an expression of themselves. The "laws" have to be seen as reflecting and entrenching their dignity as citizens, and hence to be in a sense an extension of themselves. This understanding that the political institutions are a common bulwark of citizen dignity is the basis for what Montesquieu called "vertu"…But it is quite unlike the apolitical attachment to universal principle that the stoics advocated or that is central to modern ethics rule by law.

C. Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in *Philosophical Arguments* (Cambridge, Mass: Harvard, 1995) at 187. See the Nisga'a treaty for one possible model in creating this proper legal framework.

[48] *Calder* v. *A.G. B.C.* (1973), 34 D.L.R. (3d) 145.

[49] *Ibid.*

[50] *Ibid.*

[51] Some might contend, however, that the Act of State doctrine should be extended to prevent the Court from reviewing the very assertion of Crown sovereignty. This may be called for on the ground that such review (despite not being an issue of treaty of conquest) would nevertheless be a challenge to an Act of State. In support, they may cite the rationale of the doctrine which is a "recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in municipal Court", *ibid.* For those who make this argument it should be remembered that the history of Parliamentary democracy's development is its attempt to restrict and constrain the Crown's prerogative powers, see C. Hill, *The Century of Revolution: A History of England, vol. 5, 1603-1714* (London: Thomas Nelson, 1961) at 34-74, 119-144, 222-241, 275-290. The extension of the Crown's prerogative to mere "assertions", may be a dangerous precedent that undermines the hard fought struggles to bridle Crown power.

[52] For commentary on the differences between institutional and individual independence of the judiciary see the observations of the Chief Justice of Manitoba, R. J. Scott, "Accountability and Independence" (1996) U.N.B. L. J. 27.

[53] See R. v. *Lippe* [1991] 2 S.C.R. 114 at 139:

> ...judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality.

[54] Stuart Kings in England in the 1600's greatly impaired judicial independence by dismissing judges who did not render decisions favourable to them. In 1701, when William and Mary ascended to the throne, the English Parliament enacted a bill guaranteeing the independence of the judiciary as part of the revolutionary settlement. Judicial independence in Canada traces its source to this Act. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3; (1997), 150 D.L.R. (4th) 577 the Supreme Court considered the issue of judicial independence which arose as a result of certain provincial legislatures reducing the salaries of provincial court judges. The majority of the Court found that the province's actions in reducing these salaries without recourse to an independent commission threatened the implied code of judicial independence found in the preamble to the Constitution, which incorporated the constitutional principles surrounding the *Act of Settlement.*

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[55] L. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal: McGill-Queen's Press, 1997) at 3.

[56] (1985), 20 D.L.R. (4th) 399 at 401. Judicial independence also applies in Canada, as the Court noted at 402:

> In inheriting a constitution similar to that of the United Kingdom we have also inherited the fundamental precept that the courts represent a separate and independent branch.

[57] See the Supreme Court of Canada's comments *In the Matter of Section 53 of the Supreme Court Act, R.S.C., C. S-26; and In the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, Dated September 30, 1996* [hereinafter *Quebec Secession Reference*] at para. 72:

> Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary democracy to one of constitutional supremacy.

[58] A leading constitutional scholar, Professor P. Hogg, has observed:

> The independence of the judge from the other branches of government is especially significant, because it provides an assurance that the state will be subjected to the rule of law. If the state could count on the courts to ratify all legislative and executive actions, even if unauthorized by the state, the individual would have no protection against tyranny.

P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) at 172. It may be asked why the Court should even have this power as an alien political body on Aboriginal land. One answer to this question is that Canadian courts are courts of law (not politics), and should equally examine principles of law from Canadian and Aboriginal societies, to deliver a judgment based on these criteria. Their jurisdiction does not flow from legislatures, but rather flows from their grounding decisions on legal principles.

[59] *Manitoba Reference Case, supra*, note 2. For an excellent article examining the distinctions between constitutional principles and provisions in the rule of law, see P. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 *Osgoode Hall L. J.* 411. For an alternative argument regarding the importance of the distinction between constitutional principles and provisions, see J. Bakan and D. Scheiderman, "Submission to the Standing Senate Committee on Legal and Constitution Affairs Concerning Bill C-22" [unpublished].

[60] *Manitoba Reference Case, supra*, note 2 at 26.

[61] J. Locke, *The Second Treatise on Government* (New York: Macmillan, 1985) at 9-10.

[62] As the Supreme Court said in the *Quebec Secession Reference* (the case asking whether Quebec could separate from Canada through a unilateral declaration of sovereignty), *supra*, note 57 at para. 76:

> Canadians have never accepted that ours is a system of simple majority rule.

[63] "It is inherent in the concept of adjudication, at least as understood in the western world, that the judge must not be an ally or supporter of one of the contending parties", Hogg, *supra*, note 58 at 172.

[64] Adjudication by neutral judges is considered one of the most important benefits of civilization; see J. Locke, *The Second Treatise on Government* (New York: Macmillan, 1985) at 9-10. However, for a discussion of how a judge may never be compelled to arrive at a certain result because of the interpretive nature of law and the value-laden character of the judicial role, see D. Kennedy, "Toward a Critical Phenomenology of Judging"; in A. Hutchinson and P. Monahan, *The Rule Of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 141.

[65] W.R. Lederman, "Judicial Independence and Court Reform in Canada for the 1990's" (1987) 12 *Queen's L. J.* 385.

[66] Chief Justice Antonio Lamer observed:

> The rule of law, interpreted and applied by impartial judges is the guarantee of everyone's rights and freedoms…Judicial independence is at its root, concerned with impartiality in appearance and fact. And these, of course, are elements essential to an effective judiciary. Independence is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.

M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 1. For further discussions of impartiality and judicial independence see also *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 at 685; R. v. *Genereux*, [1992] 1 S.C.R. 259 at 283; R. v. *Beauregard*, [1986] 2 S.C.R. 56 at 69; *Liteky* v. *U.S.*, (1994), 114 S.Ct. 1147 at 1155 cited with approval in *R.D.S.* v. *The Queen* (1997), 10 C.R. (5th) 1 (S.C.C.) at para. 105; R. Devlin, "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. *R.D.S.*" (1995) 18 *Dal. L. J.* 408.

[67] In *R.D.S.* v. *The Queen, ibid.* at para. 106, Justice Cory cited with approval R. v. *Bertram* [1989] O.J. 2123 (H.C.) at 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another in a particular result. In

> its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her judicial functions impartially in a particular case.

[68] The fictive exchange between Thomas More and William Roper in the play "A Man For All Seasons" illustrates this idea:

> More: …What would you do? Cut a great road through the law to get after the Devil?
> Roper: I'd cut down every law in England to do that!
> More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down – and you're the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake.

R. Bolt, *A Man For All Seasons: A Play of Sir Thomas More* (Toronto: Bellhaven House, 1963) at 39.

[69] Different perspectives on this case can be found in D. Schneiderman, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: Lorimer Publishing, 1999).

[70] *Quebec Secession Reference, supra*, note 57, at para. 33.

[71] R. v. *Sparrow*, 70 D.L.R. (4th) 385 at 412.

[72] *Quebec Secession Reference, supra*, note 57, at para. 49.

[73] *Ibid.*, at para. 32.

[74] *Ibid.*, at para. 49.

[75] See J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 *U.B.C. L. Rev.* 1.

[76] B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 *Osgoode Hall L. J.* 101.

[77] Though the court has written of the importance of Aboriginal oral traditions (*Delgamuukw, supra*, note 27 at paras. 78-108), law (R. v. *Vanderpeet*, (1996), 137 D.L.R. (4e) 289 at para. 42), and perspectives (*Sparrow, supra*, note 71 at 401. For academic commentary about the implications of Aboriginal normative values for constitutional law see: J. Borrows and L. Rotman, "The Sui Generis

Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 *Alta L. Rev.* 9; S. Henderson, "Empowering Treaty Federalism" (1995) 58 *Sask. L. Rev.* 241; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar Rev.* 727; J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); J. Weber, Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 35 *Osgoode Hall L. J.* 623; M. Walters, "The Golden Thread of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 *McGill L. J.* 711.

[78] *Quebec Secession Reference, supra,* note 57, at para. 32.

[79] *Ibid.*, at para. 54.

[80] Lamer, C.J.C., wrote:

> These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

Ibid., at para. 49.

[81] *Ibid.*, at para. 55.

[82] *Ibid.*

[83] For a discussion of the centralist orientation of the *Constitution Act 1867*, see D. Creighton, *Confederation: Essays* (Toronto: University of Toronto Press, 1967).

[84] *Quebec Secession Reference, supra,* note 57 at para. 55.

[85] *Ibid.*, at 58.

[86] A. Cairns, "The Judicial Committee and its Critics" (1971) 4 *Canadian Journal of Political Science* 301; M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's" (1974) *U.B.C. L. Rev.* 244; R. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work" (1996) 46 U.T.L.J. 427.

[87] *Citizens Insurance Company* v. *Parsons* (1881), 7 A.C. 96 (J.C.P.C.); *Hodge* v. *The Queen* (1883), 9 A.C. 117 (J.C.P.C.); *A.G. Ontario* v. *A.G. Canada* (The Local Prohibition Reference), [1896] A.C. 348 (J.C.P.C.); *Montreal* v. *Montreal Street Railway,* [1912] A.C. 333 (J.C.P.C.); *A.G. Canada* v. *A.G. Alberta* (The Insurance Reference), [1916] 1 A.C. 598 (J.C.P.C.); *Reference Re the Board of Commerce Act 1919 and the Combines and Fair Prices Act, 1919,* [1922] 1 A.C. 191 (J.C.P.C.); *King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *A.G. Canada* v. *A.G. Ontario* (Labour Conventions), [1937] A.C. 326 (J.C.P.C.); *A.G. Canada*

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v. *A.G. Ontario* (The Employment and Social Insurance Act), [1937] A.C. 355 (J.C.P.C.); *A.G. British Columbia* v. *A.G. Canada* (The Natural Products Marketing Act), [1937] A.C. 377 (J.C.P.C.). For further discussion of the strengthening of provincial powers under the Constitution through judicial interpretation see G.P. Browne, *The Judicial Committee and the British North American Act* (Toronto: University of Toronto Press, 1967).

[88] See B. Ryder "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 *McGill L. J.* 309.

[89] Dominion jurisdiction in relation to Aboriginal Peoples is found in s. 91(24) of the *Constitution Act 1867* which provides federal power in matter of "Indians and lands reserved for Indians". Problems of application of 91(24) which "threaten to undermine the autonomy of Aboriginal Peoples" are discussed in:

[90] *Quebec Secession Reference, supra,* note 57, at para. 53.

[91] *Ibid.*, at 59.

[92] *Ibid.*, at 62.

[93] *Ibid.*

[94] *Ibid.*, at 63.

[95] *Ibid.*, at 64.

[96] *Ibid.*, at 65.

[97] *Ibid.*, at 67.

[98] For example, see discussion in C. Harris, *The Resettlement of British Columbia* (Vancouver: U.B.C. Press, 1997) at 68-102; P. Tennant, *Aboriginal Peoples and Politics of British Columbia* (Vancouver: U.B.C. Press, 1990) at 39-52, 96-113.

[99] A.L. Getty and A.S. Lussier, *As Long as the Sun Shines and the River Flows* (Vancouver: U.B.C. Press, 1983) at 29-190 (development of Indian Act); J.R. Miller, *Shingwauk's Visions: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) at 151-216 (assimilation through residential school policy).

[100] See the voluminous transcripts from the Royal Commission on Aboriginal Peoples where these viewpoints were continuously recorded on *For Seven Generations: Report of the Royal Commission on Aboriginal Peoples,* CD-ROM: *The Royal Commission on Aboriginal Peoples*, (Montreal: Libraxus, 1997).

[101] *Quebec Secession Reference*, *supra*, note 57, at para. 67.

[102] G. Watts, Chairman of the Nuu-Chah-Nulth Nation on Vancouver Island, said:

> There is this term being tossed around about Aboriginal title. Well, I even disagree with this term….What we have in our area is the Ha Houlthee, which is not Aboriginal title. Ha Houlthee is very different from the legal term of Aboriginal title. And you can't extinguish my title because it comes from my chief. You have to destroy us as a people if you want to extinguish our title. That is the only possible way to extinguish our title, to get rid of us as a people.

F. Cassidy, ed., *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville: Oolichan Press, 1991) at 22

[103] *Quebec Secession Reference*, *supra*, note 57 at para. 71.

[104] A paradigmatic expression of Aboriginal resentment towards Canadian law and policy relative to Aboriginal peoples is *The Unjust Society*, *supra*, note 41. This book continues to have great relevance even though it was written over thirty years ago because many of the issues identified have not been resolved, but have grown worse.

[105] A. McGillivray and B. Comaskey, *Black Eyes All of the Time* (Toronto: University of Toronto Press, 1999) at 22-52; D. Culhane Speck, *An Error in Judgement* (Vancouver: Talonbooks, 1987).

[106] For treatment of these issues, see generally R. Kunin, ed., *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.* (Vancouver: Laurier Institution, 1998).

[107] See the excellent essays of C. Backhouse in *Colour Coded: A Legal History of Racism in Canada* (Toronto: Osgoode Society, 1999) at 1-131.

[108] *Quebec Secession Reference*, *supra*, note 57 at para. 74.

[109] *Logan* v. *Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (upholding forcable eviction of traditional Haudenosaunee government).

[110] For example, J. Trutch, in denying Aboriginal title in B.C. observed:

> The title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by Government, but on the contrary, is distinctly denied.

British Columbia, Papers Connected with the Indian Land Question, 1850-1875 (Victoria: Government Printer, 1875) at appendix 11.

[111] S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: U. of Manitoba Press, 1999).

[112] Aboriginal people are constantly charged with criminal offences for hunting and fishing in traditional economic pursuits. Some high profile cases are R. v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.); *Simon* v. *The Queen* (1985), 24 D.L.R. (4th) 390 (S.C.C.), R. v. *Horseman* [1990], S.C.R. 901 (S.C.C.), R. v. *Côté* (1996), 138 D.L.R. (4th) 185 (S.C.C.), R. v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.), R. v. *Marchall*, [1999] 2 S.C.R. 456.

[113] *Thomas* v. *Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.) (Aboriginal Spirit Dancing not protected by Charter); *Jack and Charlie* v. *The Queen* (1985), 21 D.L.R. (4th) 641 (S.C.C.) (taking fresh deer meat for Aboriginal death ceremony not protected).

[114] Many bands were kept apart or relocated to prevent their association because of a government fear they would organize to resist impingements of their rights.

[115] A Crown fiduciary duty has recently been articulated in an attempt to cure violations of Aboriginal rights stemming from differences in the way Aboriginal people hold and access their rights. Significant cases in this regard are *Guerin* v. *The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.); *Kruger* v. *The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.); *Blueberry River Indian Band* v. *Canada* (1995), 130 D.L.R. (4th) 193 (S.C.C.). For a fuller discussion see L. Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996).

[116] *Canada (A.G.)* v. *Lavell*, [1974] S.C.R. 1349 (individuous distinctions in *Indian Act* or basis of sex upheld).

[117] *Ibid.*

[118] Indians could not vote in Canada until the 1950's and 60's, for example, in British Columbia see *Qualification and Registration of Voters Amendment Act*, 1872, s.13. Indians also had restricted access to legal remedies. For example, see Section 141 of the *Indian Act* 1927 which reads:

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty…

For commentary, see B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) at 59.

[119] *Quebec Secession Reference*, *supra*, note 57 at para. 74.

[120] *Ibid.*, at para. 80.

[121] *Ibid.*

[122] *Ibid.*

[123] R. v. *Vanderpeet*, *supra*, note 77.

[124] R. v. *Côté*, (1996), 138 D.L.R. (4th) at para. 53.

[125] For the Supreme Court's discussion of similar issues in Quebec's claim of the right to secede on the principles of self-determination, see *Quebec Secession Reference*, *supra*, note 57 at paras. 131, 133, and 134. The exploitation and colonization of Aboriginal peoples occurred through, *inter alia*: the imposition of band councils over hereditary governments, the criminalization of their social, economic and spiritual relations through the enactment of the Potlach laws, the fragmentation of their territorial integrity through the denial and/or infringement of land rights and the creation of small inadequate reserves, the century-long denial of the right to vote in federal and provincial elections, the traumatic removal of whole generations of children through residential schools and insensitive child welfare laws, and the restricted access to their traditional food sources through the imposition of discriminatory fishing and hunting licences.

[126] *Quebec Secession Reference*, *supra*, note 57 at para. 138.

[127] *Ibid.*, at para. 131.

[128] *Ibid.*, at para. 133.

[129] *Ibid.*, at para. 134.

BY ANY OTHER NAME ...

Roderick A. Macdonald

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Throughout this short essay I have drawn occasionally from the primary source of the literary canon of Western Europe: the Christian Bible.[1]

My aim is not to make any deep claims of a religious nature; rather, it is to show that the themes now open for discussion resonate with the deepest concerns of a cultural tradition – my own. In proceeding in this manner, I am conscious of, and mean to acknowledge, the powerful meaning of Elders' prayers and traditional stories for Aboriginal peoples. This said, I must leave it to each of my readers to find the appropriate analogies in his or her own cultural tradition – a task I am, obviously, incompetent to perform.

In the interests of readability, I have not rewritten the text as an academic paper and have, consequently, kept footnote references to a minimum. Moreover, the comprehensiveness of sources cited in the other papers in this collection obviates the need to do so here.

Introduction

In Chapters 19–25 of the *Book of Exodus* in the *Pentateuch,* one finds the story of the Ten Commandments. Many think the only point of the story is the 10 commandments themselves – that is, their content. Anybody familiar with Canadian law today would, however, question the significance of a mere 10 rules (counting, in English, less than 200 words). After all, our current statute book is many thousands of pages long. For religious scholars, the key to the story is not the 10 injunctions set out on tablets of stone but is, rather, the reaffirmation of the covenants between God and

Abraham and God and Noah, in which God accepted limitations on his absolute power, and agreed first, never again to demand a sacrifice like he had of Abraham, and second, not to destroy mankind with another flood. The central idea is the reiterated commitments between the creator and his (*sic*) "chosen" people, the Israelites.

Compare these foundational agreements with other covenants familiar to students of western European history. Since the Peace of Westphalia in 1648, European governments have systematically sought to end wars by means of negotiated documents they call treaties: the Treaty of Utrecht of 1713; the numerous treaties of Paris (including those of 1763 and 1783); the Treaty of Versailles of 1919; and so on. Only when one warring party has completely crushed another, or when the victors cannot agree among themselves as to the shape of the "new world order" (as was the case at the end of World War II) have European states desisted from the pretence of a negotiated treaty with a vanquished foe.

Few treaties are meant only to rewrite the past. Most are intended principally to establish a framework for future interaction. Sometimes these agreements are also known as conventions. In the 20th century, they are typically multi-lateral, involving several parties. Treaties constituting and confirming broad-based political and economic alliances come immediately to mind. The treaty that established the Triple Entente in 1905 is one example. The U.S.-Canada Free Trade Agreement, and later the North American Free Trade Agreement are two others. But treaties can also have a relatively narrow compass: the Warsaw Convention of 1919 and the Chicago Convention of 1949, both relating to aspects of civil aviation, are well-known instances. In all these cases, the treaty is essentially facilitative and forward looking.

It is, of course, not just between states and between nations that treaties are negotiated. All types of human organizations – whether political, social, cultural or economic – are constantly involved in the treaty making process. Frequently, these involve institutional mergers. In 1919, the Congregational and Methodist churches and most of the Presbyterian congregations in Canada agreed to merge into a new entity called the United Church of Canada. During World War II, the Montreal Maroons hockey team agreed to its absorption into the Montreal Canadiens, although the arena in which the new team was to play, the Montreal Forum, belonged to the Maroons. In 1969, Sir George Williams University (a predominantly night school run as an offshoot of the downtown YMCA in Montreal), merged with Loyola College (which, as the name suggests, was a Jesuit-run liberal arts college in the Notre-Dame-de-Grâces neighbourhood of Montreal) to form Concordia University. More recently, we have seen a spate of attempts at corporate consolidation: the completed Air Canada/Canadian, and the unsuccessful Burlington Northern-Southern Pacific/Canadian National Railways deals being prominent instances.

These wide-ranging political, social, cultural and economic covenants need not always involve mergers and fusions. Trade unions routinely sign collective agreements with employers. Agricultural cooperatives are covenants between several commodity producers. Partnership agreements between lawyers, between engineers, or between accountants perform a like function. The articles of incorporation of a company, the constitution of a social club, a multi-party environmental agreement, and the tacit understandings arising from a sentencing circle are other types of broad-based covenants.

Even two individuals can use the treaty as a means of organizing their affairs. Following a criminal conviction, an offender may sign a restitution agreement with a victim. When a marriage is on the verge of breaking down, a couple may negotiate a separation agreement, or even a divorce settlement that a court later approves. These "private" agreements, like treaties between states, are not always used as a means to resolve a dispute or overcome a pathology. They can, and do, serve an important planning function as well. Intending spouses may sign a pre-nuptial agreement about their economic and other affairs. Future employees may sign non-competition agreements as a condition of employment. The ordinary law of contracts is, in brief, a set of rules about how to make treaties.

The above examples give only a snapshot – a very incomplete inventory of the practices and possibilities for treaties. Nonetheless, they suggest how pervasive the idea of treaties now is. In Sir Henry Maine's memorable phrase, we have, at least formally, moved from "status to contract" as the primary institution of inter-subjective communication.

There is another point. Most agreements today are in writing. But they need not be. For example, God's original covenants with Abraham and Noah were unwritten. Indeed, while the Ten Commandments were carved in tablets of stone, God's covenant with Moses and the Israelites was sealed with blood and symbolized by the "Ark of the Covenant". Likewise, when intending spouses exchange engagement rings, the rings symbolize their betrothal, and the wedding rings symbolize their marriage vows. Still again, when people who have come to an agreement shake hands on a deal, or drink a toast to celebrate the successful conclusion of negotiations, the handshake or the toast come to stand for the agreement.

A ring, a handshake and a toast are the material symbols of an agreement; neither of them is the agreement itself. The agreement is larger, more subtle and deeper than the symbol. Most people intuitively grasp this idea. Yet they have a harder time applying it to the words of a written covenant. This is probably because human beings usually want to believe – falsely, of course – that words have meaning in and of themselves. Only by propounding a distinction between the "letter" and the "spirit" that are we even able to appreciate why the texts of an agreement can be just like the exchange of rings or a handshake. The texts are the physical manifestation of the agreement. They are not the agreement, although they stand surrogate to it. Contract lawyers today well understand, just like Moses and the Israelites 3000 years ago well understood, that the written document called a contract is no more than a point of access to the agreement among the parties.

Covenants, treaties, agreements, contracts. All are a fundamental part of modern living. All have also been part of our diverse heritages. All serve a roughly analogous social function. What is that function? It is to manage the uncertainty of an on-going relationship among two or more human beings in close interaction, or two or more institutions (typically political States or economic enterprises) by having them make a commitment to a course of conduct: (1) that announces mutual recognition; (2) that describes a past; (3) that contains rudimentary stipulations of what is to be expected for the future; and (4) that announces the benefits of faithful adherence, as well as foreshadows the burdens of a failure to do so.[2]

As one particular form of inter-personal or inter-institutional engagement, a treaty shares several features with covenants, agreements and contracts. But the names we use to identify these different forms of engagement are not synonyms. There is a reason why each has its own name. The word treaty has been invested with a meaning that orders expectations about these common features in a particular way. This explains why the question "What is a treaty?" seems to matter so much to some people. It also hints at why the Oxford dictionary, no more than the Supreme Court of Canada, can never give an adequate definition of a treaty.

Because a treaty is a performative symbol, it cannot be defined. Neither the standard *per genus et differentium* (or comparative) types of legal definition that are so familiar to lawyers, nor definitions grounded in essences (the necessary substantive characteristics) of things, nor formal definitions, nor teleological definitions of things by reference to their purposes or functions, can provide an adequate account of treaties. The only possible answer to the question "What is a treaty?" is "Whatever the parties to it want it to be."

This being said, for present purposes, a cluster of ideas about treaties can, nonetheless, help orient our thinking. A treaty imagines the future, but it lives in the past. It is a symbol, but it has an instrumental purpose. It is formal, expressive text, but it is also meant to be acted upon. It speaks truth, but paradoxically, it does so by recognizing the partiality of that very truth. Most importantly for present purposes, a treaty is a moral intendment that dares not speak its name. I believe that these are the five ideas that give treaties, and the treaty making process, their central roles in the on-going iteration of relationships between Aboriginal and non-Aboriginal peoples in British Columbia.

Let me turn briefly to a discussion of the implications of each of them for the effort today to "speak truth to power".

The Future in the Lens of the Past

What do I mean by saying that a treaty imagines the future by reimagining the past?

Consider the following. A common children's game is to play fireman, doctor, policeman, teacher or whatever. This child's play is an implicit reflection of the question: "What do you want to be when you grow up?" Of course, there is never a settled answer to that question. Our desires and career ambitions are in continuing flux. I can personally attest that, even at age 50, one does not really know what one wants to be when one grows up. This thought is nicely captured in I Corinthians 13, verses 11-12. There, one can find this statement, citing the King James version: "When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things. For now we see through a glass darkly, but then face to face: now I know in part; but then shall I know even as I am known." The sobering thought is that adults, just as much as children, can only claim partial knowledge and partial understanding. There is no magic moment, at least in this world, when we achieve full knowledge.

The unattainability of perfect knowledge does not, of course, mean that we are condemned to live and speak inauthentically. Recognizing our partiality is a first step to speaking authentically. Each day, we are constantly rewriting our autobiographies with this goal in mind. We use these autobiographical rewrites as a means to come to a better understanding of why we are who we are now, how we have come to be that, and what we must do to become who we aspire to be. What we may have dismissed as trivial at the moment it occurred years ago, we frequently restate much later as a defining event in our lives; and *vice versa*. Some events have an alternating trajectory: trivial at 25; fatal at 45; insignificant at 65.

The experiences and feelings we choose to recall and are capable of recalling autobiographically from the past very much depend on how we want to understand our present. At the same time, our knowledge of the present is contingent upon what we remember of the past, and what we imagine for our future. Just as we all have more than one possible future, we all have more than one possible past. The gloss we put on our present lives is a product of how we choose to mediate among our pasts and our futures. Our autobiography is always partial, and always hypothetical, even as we write it down.

And here is the point. A treaty is like an autobiography, with this difference: it is a joint product of the parties to it that, as much as anything else, is the autobiography of a relationship. A treaty is a present attempt to see and understand our various possible futures through the lens of our various possible pasts. What a treaty may say if drafted today will never be exactly what it would say if drafted a decade ago, or a decade hence. Ten years ago, the present biographies of the parties to the treaties were different; 10 years from now they will also be different. There can never be a perfect treaty negotiated and drafted in full knowledge and full understanding. There can only be authentic treaties negotiated in candid recognition of the partiality and contingency of our pasts, our present and our futures.

All parties to treaties have to be prepared to recognize and, where appropriate, shed the separate autobiographical myths of the past that stand in the way of their imagining joint autobiographical myths to shape the present and to guide the future.[3]

A Symbol and an Instrument

To suggest that a treaty is both a symbol and an instrument is to recast one of the most difficult questions we can ask about human artefacts. Are these products of human endeavour a means towards an end, or are they ends in themselves? Or are they both?

A common reaction when negotiations in view of an agreement become stalled over its language is to cry out in frustration: "Forget the technical language, just give me what I want." Statements like this are, obviously, grounded in the view that it is just the result that matters, not the way that result is achieved. In this instrumental view of human activity and relationships, there is no particular value to a treaty as such. The treaty is just a means to an end; and the real end is to determine who gets what? under what conditions? and for how long? Whether these ends are achieved by treaty, by unilateral action, by legislation, or by a settlement imposed by a third party really is a secondary concern. In other words, if one accepts the purely instrumental view that a treaty has no intrinsic value, whether a treaty is, or is not, negotiated is unimportant. *A fortiori*, whether a treaty has two pages or 200 pages is irrelevant; and whether its prose is elegant or stilted is less relevant still.

Now contrast this approach with the view that the "medium is the message". In such an approach, the specific content of a treaty would be far less important than the fact that there is a treaty that has been agreed upon. The treaty as an acknowledgement of the mutual recognition of signatories, and not the precise commitments that the agreement sets out, is the object of the exercise. Because these commitments have only a passing value, whether or not they are executory, or even intended by the parties to be executory, is far less important than the elegance and the passion by which they are expressed. Again, because recognition is the primary goal, a ringing endorsement of recognition is what gives the treaty its resonance and purpose. Compare, for example, Lincoln's Emancipation Proclamation of 1862 with the Preamble to the *Constitution Act, 1867*.

More than this, the solemnity of a signing ceremony, the weight and quality of the parchment or paper used, the typeface or calligraphic style chosen and the heraldic accoutrements of the document can all be powerful affirmations of mutual recognition and commitment. They reinforce meaning precisely because they do not overtly claim to express meaning. As one famous author explained, after completing a lengthy manuscript, why she was so grateful to her spouse: "He may not know what it means, but he knows what it meant."

A similar idea can be seen in the way discussions about the role of Quebec in the Canadian confederation were framed during the 1960s and 1970s. There seemed to be a lack of communication between those French-speaking Quebeckers who identified themselves as separatists and those, whether English or French-speaking, who opposed the proffered "projet de société". Many frustrated English-speaking Canadians constantly asked, in good faith, "What does Quebec want?" only to be met with the response, "If you have to ask, there is no hope!"

In situations of tension, where one party feels that recognition and respect are lacking, it is difficult to state what the problem is. The response by those who see the hurt and who genuinely want to address it, is to try to respond directly to the hurt by making concrete gestures to overcome it. Asking "What do you want?" is one such gesture. Yet, in many cases, this is just to compound the initial difficulty. For separatists in Quebec, the instrumental riposte to an instrumental enquiry can only be – "independence". The unstated undertone of the riposte is, of course, that if only independence is achieved, recognition and respect will follow.

But this is to get things backwards. Recognition and respect have to come first; when they do, the instrumental questions will be phrased differently and can be more fully addressed. The "distinct society" clause of the failed Meech Lake Accord is an excellent illustration of the incommensurability of symbolic and instrumental claims. The clause was understood and celebrated by many in Quebec for its symbolism – recognition; outside Quebec, it was typically disparaged for its (highly improbable) instrument impact – special status. Instrumental questions and answers can never be in dialogue with symbolic affirmations.

So the point will not be lost, it is worth noting that it is not just texts written in a natural language that are meant to mediate the symbolic and the instrumental in human interaction. A national anthem and a flag serve a like function. The "two-row wampum" is still another mediating human artefact. All, of course, are highly symbolic for what they represent, much more than for what they say. Their power, indeed, comes from the representation, not the discursive meaning.

For all these reasons, the following conclusion is inescapable. A treaty making process that seeks only to address specific points of the "what do you want?" variety will capture only one-half the rationale for a treaty. This is not to say that instrumental content is unimportant. But, even if all the particulars were to be agreed upon, should the negotiating process reflect a continuing failure of recognition, resentment and bitterness would result. The tacit message in such a case will always be: "We have given you what you asked for; now go home and be quiet".

No such easy dismissal is possible, however, when the claim is cast not as "give me what I want" but as "give me what is due to me." Establishing exactly what is due constitutes the core of any negotiating process – including the treaty making process. It necessarily involves much more than ticking off "accept" or "reject" beside a list of "non-negotiable demands." Unless a treaty is responsive to the symbolic need for recognition, identity and respect, it is unlikely to make a lasting contribution to achieving a foundation upon which to pursue continuing situations of complex human interaction.

We are now at a point where too many people have invested too much emotional capital in the word "treaty" for the term to be cast aside. For them, the simple fact of asking "What is a treaty?" is another way of saying that, whatever the content of an agreement, it must be publicly symbolized as a treaty.[4]

Expressive and Performative

A treaty is, formally, a document or other artefact that is said to express the joint understanding and the will of those who are parties to it. It is an attempt to capture in a canonical form a series of commitments that parties undertake towards each other. Some treaties can be quite detailed. The North American Free Trade Agreement is an example. Some can be quite short and laconic. "Do you take this man to be your lawfully wedded husband? ... I do."

What any treaty overtly expresses is necessarily only a fraction of what it says. The various provisions of a treaty are, in some measure, answers to questions that negotiators have posed during the treaty making process. But they are also much more than this. Although phrased in the indicative rather than the interrogative mood, treaty provisions are, above all, further questions that the negotiators believe will keep the processes of negotiation alive. To use a musical analogy, they are themes upon which future generations are invited to compose variations to suit both time and place.

It is important, nonetheless, to attend to the specific language of treaties. Modern day treaties are, after all, expressed in the vocabulary, grammar and syntax of a natural language. Sometimes, however, words fail us: a treaty may be unhelpfully vague or intentionally silent on some of the key issues that parties have to decide. This is not uncommon in human affairs. When spouses say to each other "I love you", they often intend as much as anything to foreclose further questioning about issues like "why?", "how?", and "for how long?". Likewise, many treaties contain statements that reflect and affirm a commitment, but that also mean to pre-empt further specific consideration of the content of that commitment. The general point goes even further than this. Sometimes, treaty makers collude in consciously avoiding negotiations about provisions dealing with certain topics. For these reasons, a treaty always balances two paradoxes in the expressive function of texts: the need to **not** say something by explicitly saying it; and the need to say something by **not** explicitly saying it.

There is even more to a treaty than the language, and non-language, by which it is expressed. A treaty is performative as well as expressive. That is, a treaty is not meant simply to be written, read and put on a shelf. It is meant to lead to a course of conduct. In this respect, a treaty is a reflection and an acknowledgement of the necessary interconnectedness of the parties to it. A treaty is born of the recognition that both parties are in for the long run. Neither is going to go away. A first performative function of a treaty is, consequently, to assist the parties in finding, describing and living for the future what they have in common – what they wish to share.

This sharing may be material, or intellectual, or both. Parties may share the same land, the same resources, the same house. They may also share a significant history. They may have suffered privation together; they may have overcome obstacles together. They may have shared triumphs; they may have shared failures. In some cases, the only thing that parties to a treaty have shared in the past is suspicion or even hatred. A very good example of a treaty of this sort is the Treaty of Rome by which the first parts of the political entity, now known as the European Community, was put together with the European Coal and Steel Agreement in 1951. At the time it was signed, France and Germany had little but antipathy for each other. But that antipathy, and the fear accompanying it, was shared and became the basis for a treaty making process.

Much of the function of a treaty lies in its explicit recognition of past sharing and the transformation of that, often negative, sharing into a positive sharing for the future that is meant to be executed in good faith. Let me develop this idea by contrasting two different ways in which human beings come together for their mutual benefit. In some cases, they unite in order to pursue one or several common purposes. For example, imagine two travellers moving in opposite directions who chance upon a huge boulder that blocks a pathway. Neither can move the boulder on his or her own. Together they can. By working together to achieve a common purpose, they accomplish a goal that is mutually beneficial. Contrast this with a situation of two neighbours, one of whom grows wheat, the other who raises cows. Here they can come together in a cooperative situation to the benefit of both by trading some wheat for some milk. Yet, each is pursuing his or her own purpose.

These two stories reflect, in stylized form, two different principles of human association: organization by the pursuit of common ends; and organization by reciprocity. At first glance, treaties seem to take the form of an organization by reciprocity – they appear to be nothing more than an agreement or contract by which parties trade off claims or assets against the claims or assets of each other. Many on both sides of the treaty making process actually want treaties in order to deny that there has been a shared past and can be a shared future. They are, nonetheless, also a reflection of organization by common ends and the pursuit of a shared purpose. In other words, these two principles of human association are not mutually exclusive.

Indeed, what gives a treaty its distinctive character by contrast with an ordinary contract, is the equal importance of these two principles. However, much of the expressive function of a treaty appears to be grounded in reciprocity and trade-offs, its performative function will strongly resonate in organization by common purposes in aid of a shared future. And, however much treaties are an occasion to express a sharing of a past, a present and a future, they do so by acknowledging the reciprocity of all performances.[5]

Telling Truth by not Telling Lies

Each time we speak, we are telling a story. And since our words are strung out one after the other (the discursive property of natural languages), necessarily we make choices about what features of the story being told are important, what order they should be presented in, and how they should be emphasized. Since we are not able to say everything all at once, the manner of our telling a story is as important as its content. Again, since we are not able to say everything all at once, every statement we make will necessarily be a partial truth. The meaning of the courtroom injunction to "tell the truth, the whole truth, and nothing but the truth" resides in its tacit acknowledgement (admission?) that the most damnable lies are not overt falsehoods. Overt falsehoods can usually be recognized and contested. Most insidious in ordinary communications between human beings are partial truths masking their partiality and parading as gospel.

In oral cultures and sub-cultures – be this orality an expression of traditional myths and legends, or be it simply anecdotes about long dead family members – our stories are told differently every time. That explains, in part, why some people are renowned as storytellers and others are not. More than this, the way we tell the story is often dependent on who the audience is. Subtle shifts in language and presentation can radically change the lessons of a story, the tenor of a metaphor, or the impact of a joke. Think for a moment about the differences in the way children's fairy tales are told – whether across languages or across families. Between two tellings of what we might wish to call "the same story", much in emphasis and understanding can change.

It is not just in oral cultures that alternative versions of stories occur. Multiple renditions are also a typical feature of both literature and journalism. *West Side Story* is *Romeo and Juliet* in modern garb; *My Fair Lady* reprises *Pygmalion*. Every day, the headlines of our national newspapers proclaim the same event in sharply different terms. Even "canonical" and "sacred" texts present the variousness of human experience. In the Christian Bible, for example, there are four, not altogether consistent, Gospels about the life and ministry of Jesus. More compellingly, the first chapters of the Book of Genesis offer alternative accounts of the story of Creation.

In Genesis 1-2(4a) we have a story of Creation that notes: (1) that creation is divided into days and nights; (2) that animals are created before man; (3) that animals and everything else are part of God's design; (4) that man is to rule the world; (5) that men and women are created equal; (6) no names are given to creatures; and (7) that God makes a day of the week holy. But immediately following this presentation, in Genesis 2(4b)-3(24) we have another story of Creation that introduces us to the Garden of Eden. This story affirms: (1) that there is no division of night and day, or days, or weeks, or other periods of time; (2) that man is created before animals; (3) that animals are not part of God's cosmic design, but are created to keep man company; (4) that man is to have charge of Eden only, and is never to leave it; (5) that woman is created from (and after) man; (6) that all creatures, including man and woman, are given names; and (7) that God forbids the eating of the fruit of the true knowledge of good and evil.

How can these two stories of creation – both of which are written down, and that directly follow each other at the beginning of the Bible – be so different? How can the sacred texts of the Old Testament – texts which believers hold as the revealed word of God – be contradictory? Which account is true? Are both true, but not a reflection of the whole truth? I cannot pretend to answer these deep theological questions. Yet, it is worth noting that neither version of the story of creation purports to be comprehensive. A biblical story (any story for that matter), has a truth that is meant to speak to, and that must constantly be reaffirmed by, the faithful (the engaged listener or reader).

Here, then, is the point. We should never forget that treaties are stories too. They do not, and cannot, tell the whole truth; at the same time, they can, and do, tell the truth. How is this possible? Let me explain. Only part of a story can ever be recounted by a treaty or a covenant. The part that is told is itself either imposed (by God or by a secular conqueror) or, in most contemporary treaties, is negotiated. We consciously negotiate and renegotiate how we shall tell our partial truths to each other in order to tell a greater truth to the world. Because truth can never be pinned down once and for all, agreeing on our partial truths is as important as the attempt to seek out our transcendent truths. Returning to I Corinthians 13, verses 8-10, we find: "... [B]ut whether there be prophecies, they shall fail; whether there be tongues, they shall cease; whether there be knowledge, it shall vanish away. For we know in part, and we prophesy in part. But when that which is perfect is come, then that which is in part shall be done away with."

Because we cannot know otherwise than in part, whatever we prophesy – be this in our treaties or elsewhere, will also be partial. A partial truth is not, however, necessarily a lie. It only becomes a lie when it refuses to acknowledge its partiality. In the treaty process, like the constitutional process, most often this refusal occurs when people come to take the truth as fixed for all time. Those who see a treaty as an unchanging and perfect reflection of agreed truth, like those who hold to the "original understanding" of a constitution, mistake the contingent for the absolute.

Truth must be constantly re-interpreted and re-understood, lest its partiality become fixed in a lie. In democratic societies, where the treaty making process always involves negotiators representing others in the re-interpretation and re-understanding of truth, there is no easy route to agreement about either our partial prophesies, or about the perfect truths unattainable in this world.[6]

An Ethic that dares not Speak its Name

All human actions, and all cultural representations of human interactions – like covenants, contracts, agreements and treaties – have two aspects: substance and form. Each of these also has, and is shaped by, its own distinctive ethic or morality. The morality of their substance and their purpose or finality is an external, patent morality; and the morality of their form and their process is an internal, latent morality. The former is reflected in the notion of duty – a standard or standards below which one's conduct must not fall. The latter is reflected in a morality of aspiration – a standard or standards that one strives to attain.

Unfortunately, much of our understanding of contracts, agreements and treaties today is driven by an overweening preoccupation with substance and with the ethic of duty. We tend to focus on whether an outcome is fair and just; we tend not to ask whether the negotiating process was fair and just. In other words, an ethic of aspiration – an ethic that would lead us to question whether or not we are negotiating in good faith – is rarely front and centre among our preoccupations. Let me explain.

A contract may be fair and just because of the way that it reflects the allocation of present need and future risk between the parties. When it is not, we use words like "unconscionable" or "lesionary" to describe the gross disproportion of benefits and burdens received or assumed by contracting parties. In these cases, one is assessing the outcome of an agreement against an external, patent standard of morality. We censure and declare void certain agreements because they fail to meet a minimum standard of balance and equity.

But this is not the only ethical dimension of the law of contracts. There is also a procedural morality that is the contractual equivalent of the notion "due process of law" against which we judge the fairness of a trial. However, because it is so difficult to express the standards of aspiration towards which we strive, we have come to state this procedural morality indirectly. Our concerns are framed almost exclusively in the language of duties. Hence, contracts can be set aside if there was no real consent: were one or both parties operating under a mistake? was one party's consent obtained under duress? was there fraud being practised by one or the other of the parties? Our inability to express an aspirational morality means that the "ethic of negotiation" – the quest for good faith negotiations – is typically destined to remain "an ethic that dares not speak its name".

This point can be illustrated by a few examples. The average, everyday commercial agreement is usually not difficult to decipher. An agreement between a buyer and a seller comes close to the economist's standard model of an economic exchange. Assuming no distortions and no market failure, the agreement should settle on a price that, by the definition of a market-clearing price, is both the most efficient and the fairest to both parties. The buyer never has to pay more than he or she wants, and the seller never has to sell at a price below what he or she wants.

Here, the underlying ethic of the agreement is egoism or hedonism. In common parlance, we say that the agreement is governed by the "morality of the market". In such a context, the role of law is minimal – it is to police the honesty of the parties (the prevention of fraud), the integrity of the transaction (to ensure that there is no mistake about what it is that is being bought and sold), and the voluntariness of each person's assent (to ensure that there is no coercion or duress). Whether one or the other party should or should not contract, whether one or the other party is making an "objectively" unwise agreement, and whether or not one or the other party ought to spend their money for something else, or sell some other object, are not direct concerns of the law.

Some other agreements are almost as easy to assess. For example, a consumer transaction between a buyer and seller has many of the same features as a commercial transaction. With one addition. The law looks more carefully at the "objective" value of the transaction to assess whether it is "unfair" or "unconscionable". Here a degree of subjectivity enters into the moral calculus. But here again, the structure of the moral inquiry is one that relates to duties. Did the agreement meet the minimum standards of fairness and equity?

Now consider the case of that species of agreement called treaties. Treaties are almost never so easily characterized and defined as ordinary contracts. To begin, it is often impossible to figure out exactly what the external, patent morality – the standards defining duties – should be. There is, in other words, no "just price" by which the respective obligations of the parties to the treaty can be compared.

What is more, because a treaty will always be negotiated against a past as well as in view of a future, there is no easy way to express what assumptions ground the perspective of each party. One party may see the treaty as a new beginning; in the present context, this inevitably leads to the demand that all claims not dealt with by the treaty be "extinguished". If the other party sees the treaty as a way of restating for the future aspects of a relationship that will always be greater than the agreement itself, then there will never be acquiesence to the "extinguishment" of anything beyond that restated in the treaty. This central difficulty over the substance of a treaty flows from a failure to find consensus on the morality of duty that underpins the agreement.

An incompletely understood ethic of duty is, however, only the start of the problem. Much harder is the business of figuring out what the internal, latent morality of the process could or should be. Let me go back to an example from the beginning of the paper. At the end of World War II, there was an expectation that a comprehensive multi-lateral treaty ending the war would be signed. In fact, no such treaty was concluded. A number of agreements between some of the victors and some of the vanquished were signed, but the victors (notably the U.S.A. and the U.S.S.R.) could not agree about what the "new world order" would look like. By contrast, after World War I, the Westphalian system of states was adjusted in a series of treaties to accommodate newly emerging nations. The Wilson doctrine propounded by the Americans provided the ethical rationale for these adjustments to the Westphalian system that had been in place for almost 300 years.

During the Cold War of the 50s through the 80s, the Soviets and the Americans could not explicitly agree on the underlying norms by which the Westphalian system would be again adjusted. The post-War settlement took shape instead in the Bretton Woods monetary agreement of 1944, the Marshall Plan, the Comecon, the GATT, and so on. The instrumental framework of this set of tacit accommodations was well understood, and could probably have been written down. But its symbolic version could not have been. As it turns out, the peace treaty was not, in fact, written until the early 1990s, after the collapse of the communist regime in the U.S.S.R. Nonetheless, some social ordering, some on-going reciprocal adjustment of interactional expectancies was occurring. These decades of hard work, commercial and cultural exchanges, mutual defence pacts, and so on became the foundation for the treaties that were eventually signed.

Here, then, is the paradox of all procedural moralities. The process of negotiation is never just the explicit process by which parties sit down at a table and trade wish lists. The hardest, and yet the most meaningful negotiations are those that take place every day in the tacit reflections of an aspiration to mutual recognition. The true "ethic of negotiation" is that it cannot speak its name because it rests on beliefs and commitments that are, and have to be, practised before they are stated. A treaty that is simply a treaty – that is, a treaty that is seen as the end of a negotiating process, rather than as a step in a continuing process of negotiation – will fail.

Such a treaty will fail because its internal, procedural morality – the ethic of its negotiation – has been cast as an ethic of duty, of finality. Where a treaty truly captures and reflects unstated practices it will succeed. And it will do so because its internal, procedural morality is necessarily rooted in an ethic of aspiration, of becoming. Paradoxically, good faith negotiation cannot be measured by the attitude that negotiators take towards the substance of the treaty being negotiated. Good faith can only be measured by their attitude towards the meaning of the process in which they are engaged.[7]

Conclusion

I should like to bring this brief paper to an end by re-stating in point form its major arguments about the form, function, process and potential of treaties and the treaty making endeavour.

First, treaties are an occasion for parties to plan a shared future by recognizing a past. Wrongs have been done by both parties. Treaties allow parties to state the wrongs, relativize their causes, state their lessons and commit to a future. A treaty is for the future, but if it does not remember, it is hollow.

Second, a treaty has a very important symbolic function that complements whatever instrumental value it brings. A treaty creates occasions for a confrontation between those who are prepared to concede everything, but to admit nothing, and those for whom instrumental concessions without acknowledgement are nothing. To require "extinguishment" as a counterpart to a treaty is to insist that the symbolic does not matter. Yet, to believe that a treaty automatically commands specific outputs is also a mistake.

Third, a treaty is in very important ways simply a formal, expressive text that records an agreement. But it is also meant to be put into practice. The key is to know what is expressive and what is performative. The process of implementation is just as important as the substantive outcome being sought.

Fourth, a treaty is meant to speak truth, but it can only do so by recognizing the partiality of that truth. All affirmations are necessarily partial. None captures the whole truth. Nor should they. For this reason, the more a treaty overtly commands its continuing re-interpretation – the more it is a totem for continuing commitment – the better it is.

Fifth, treaties just don't happen. They are negotiated. The negotiations are often hard, and lengthy. But they have this feature. They always take place against a backdrop of an implicit moral intendment. And this implicit moral intendment, the ethic of negotiation, dares not speak its name. It cannot do both because it is implicit, and because it is an ethic of aspiration, of becoming.

And so, to conclude. If there is one central message that lurks in this peroration on the "Ethics of Negotiation" it is this. A treaty making process will always engage participants in defining the community of believers – that is, the community of people who are making explicit their commitment to each other. In Luke 10, verses 25-37, we find the parable of the Good Samaritan. This parable is offered, through the manner it suggests an answer to the question: "Who is my neighbour?", as an injunction to strive to make that definition as broad as possible. The process of treaty making requires each of us to directly discover and acknowledge our neighbours. Those who are not us, but are of us; those who, like us, are people of "goodwill" and "good faith".[8]

REFERENCE NOTES

[1] See N. Frye, The Great CODE: The Bible And Literature, (Toronto: Harcourt, Brace, 1983); P. Gabel, et al, The Bible as Literature, 3rd ed. (Toronto: Oxford University Press, 1999).

[2] In its reiteration to Moses, the covenant of Yahweh had three of these four standard, formal elements. Unlike an agreement between co-equals, this covenant was of course, cast as a covenant between a ruler and the people. But each of the identified constituent elements of a covenant are present in the Pentateuch. In Exodus 19-25 one finds: (1) identification of the sovereign (I am your God); (2) a historical prologue (I delivered you from slavery in Egypt); (3) stipulations (you shall have no other Gods to rival me, and more generally, the ten commandments themselves). The fourth element, blessings and curses, was remitted in the Pentateuch to Leviticus 26 and Deuteronomy 28. These commitments that make treaties possible are carefully developed in T. Govier's wonderful paper: "Trust, Acknowledgement and the Ethics of Negotiation".

[3] The fine paper by H. Foster, "Getting There", speaks powerfully to the reciprocity of past and present.

[4] The analysis in A. Lajoie's paper "What Constitutional Law doesn't want to hear about History" of how constitutional law (mis)symbolizes history is a fine-grained elaboration of this point.

[5] R. Price's detailed description of the process in New Zealand, "New Zealand's Interim Treaty Settlements and Arrangements – Building Blocks of Certainty" nicely evokes the importance of on-going performance to meaningful expression.

[6] This is one of the key lessons of J. Borrows' thorough and thoughtful paper "Questioning Canada's Title to Land: Aboriginal Peoples and the Rule of Law".

[7] This, of course, is the gravamen of M. Stevenson's thoughtful paper: "Visions of Certainty: Challenging Assumptions".

[8] This is the central and inescapable message I take from J. Tully's subtle paper: "Reconsidering the B.C. Treaty Process".

TRUST, ACKNOWLEDGEMENT, AND THE ETHICS OF NEGOTIATION

Trudy Govier

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Trust, Respect, and Ethical Basics

Trust is an attitude that fundamentally affects interactions and relationships in negotiation as, indeed, it affects all human interactions and relationships. When trust is present, communication and problem solving are relatively easy. When distrust characterizes relationships, these things are difficult, if possible at all.

Trust involves feelings, values, beliefs, and risk. When we trust, we feel relatively comfortable and relaxed, because we believe that those whom we trust will not harm or threaten us or things we value, even though we are vulnerable to such harms, which are risked in our relationship with them. Basically, trust is a positive expectation that we will not be harmed at the hands of these others whom we trust. There are different kinds and degrees of trust in different contexts. We usually think of trust as existing between individuals who know each other to some degree. But there is a kind of trust that exists even between strangers, and trust and distrust can also be said to characterize relationships between groups. If you think of trust in a familiar context like that of going to a dentist, it becomes apparent that there are two fundamental dimensions to it: competence and motivation. We have reasonably positive expectations and are willing to submit our physical well-being to another in this situation of vulnerability, only if we regard the dentist as both competent and appropriately motivated.

To *trust* a dentist to check, drill on, and modify or extract your teeth requires believing that he knows enough, and knows how, to do this work: that is the matter of competence. If you did not trust your dentist to be competent, you would not expose yourself to his ministrations. But the other dimension, that of motivation, is also fundamental: you must think your dentist is well-intentioned towards you and is motivated to help you. This means you don't think he is about to perform unnecessary procedures at your expense. Absence of this kind of trust would also keep you out of that dentist's chair. Trust involves feelings of confidence and security, relative relaxation, and absence of fear, and beliefs about the competence and motivation of the person you trust, relevant to the context in which you are trusting him or her.

So now let us look at the context of negotiation to explore the significance of trust in that context. Later, I shall talk more about negotiations between parties representing Native and non-Native Canadians with regard to such issues as Aboriginal rights and land claims. But for the moment, I am talking about negotiations in general, so I will refer simply to parties A and B. Let us assume A and B are groups of people represented in the negotiation by one or more individuals. To avoid a painfully technical explanation here, I will begin by using the letters 'A' and 'B' to refer to these parties to the negotiation and will not dwell on the distinction between the individuals that represent the group in the negotiations and the group itself.

So let us suppose that A and B are engaged in a negotiation, and we come to consider "the ethics of negotiation," keeping in mind that trust and distrust will be significant in relationships between A and B, as they are in all human relationships. If there were not *some degree of trust*, A and B would be too fearful of each other to negotiate at all. If B completely distrusted A, he would regard any request for a meeting as a ruse, a prelude to murder or abduction, perhaps. But the conflictual situations, which underlie many negotiations, make it likely that there is also *some distrust* between the parties. Negotiations would not be needed were there not some issues, even some conflicts, between A and B. In different contexts and respects, and relative to different dimensions, both trust and distrust are likely to characterize aspects of the relationship between A and B. Trust will make for flexibility, believability, and credibility, whereas distrust will work in the opposite way.

Important at this point is the oft-cited norm that parties in a negotiation should "bargain in good faith." What this means is that when they appear in the role of parties coming together to negotiate, presenting themselves as oriented towards the achieving of some agreement – whether a contract or a treaty, the parties should really be directed towards just that. If A comes to negotiate with B, presenting himself or herself in the role of a negotiating party, but in actual fact A has no desire to reach an agreement and does not really intend to do so in these negotiations, then A is not bargaining in good faith. There are many reasons A might have for appearing in the negotiating role when he does not really want to reach an agreement. For example, A might wish to quash a union and yet he might be legally obligated to negotiate with that union; hence, he appears at the table, in the negotiating role, as though he wants an agreement – whereas what is in his interest is not to get one. Or A might want to appear to negotiate, as a matter of public relations, so that he can seem to the public or a third party to be interested in a reasonable settlement. He might need to seem to negotiate in order to lead B to defer a legal case against him. Or A might want to have B at the table during a sensitive election campaign. A might even wish to go to war with B and to have a good reason or excuse for doing so. For example, he might cite failed negotiations as a prelude to a 'just war' – for instance, he might set conditions B could not possibly agree to and then use B's recalcitrance as grounds to bomb B, saying, "There is nothing else to do. We tried negotiating and it failed." In all these cases, there would be a rupture between appearance and reality, and an *absence of good faith in the bargaining process*. A would appear as one seeking an agreement, whereas, in fact he was seeking the role of negotiating party as a means to some other end.

Essential to the ethics of negotiation is bargaining in good faith in this sense: to say that the parties are bargaining in good faith is to say that when they present themselves in the role of negotiating parties, they are not just taking on a role, but really trying to negotiate to get an agreement. That is to say, each party is present and is participating in the negotiations with the goal of reaching an agreement with the other party. To assume that one's counterpart is bargaining *in good faith* is to *trust* that appearance is reality on this point. People are not just playing a part; rather, those who come forward to negotiate an agreement really are trying and intending to do so. For two parties to negotiate and bargain meaningfully with each other, each party must assume that the other is bargaining in good faith. The assumption is essential, and it is in effect the assumption that in this fundamental respect, people are doing what they appear to be doing; appearance is reality.

Prominent in the process of negotiation – and especially prominent in collaborative models of negotiation such as that of the Harvard Negotiation Project – are honesty and respect for the other party. To identify, understand, and explore issues, negotiating parties will need to communicate and share information. Here, issues of honesty, credibility, and trust quite obviously arise. If the parties do not find each other credible and trustworthy, they will not believe claims made and will not be able to receive any information from each other. If A tells B, 'well, we have about one million we can apply to addressing your problem here,' that will only amount to *shared information* if A is telling the truth and B believes that he is. Any communication which is going to count as parties to a negotiation, sharing information with each other will require trust. If B suspects that A is misleading him by telling less than the relevant truth, or by outright lying, he will not believe A, and if he is not to believe A's claims, he is likely only to find them distracting and confusing. In that case, communication will effectively break down.

Respect is a complex matter, and something that may itself be difficult to express in contexts where relations between A and B have tended to be conflictual and marked by past inequality. The negotiation process itself has latent norms of equality and reciprocity based on an underlying respect. The very fact that A and B are negotiating with each other shows that each has something at stake, that there is an issue or a set of issues faced by both, and that in virtue of these issues, they are in a relationship where each is in some way vulnerable to the other. Each has some power, though they may have unequal amounts of power, and may have power in different ways. For example, A may have legal and economic power, while B has the power of 'the moral upper hand' in a public appeal. In an ethically conducted negotiation, each party treats the other as an equal in the negotiation, as a party with whom matters will be sorted out and there will eventually be some reciprocal arrangement to which both parties will commit themselves. The other party is to be regarded as an equal party with interests, beliefs and feelings meriting respect, attention, and consideration. Each party has a worth and dignity in its own right – and neither is to be manipulated, exploited, or treated as the instrument of the other. There is an underlying norm of moral respect and equality in the process.

Further dimensions of the ethics of negotiation are **representativeness** and **capacity for commitment**. At this point, we do need to observe the distinction between the individual negotiators who appear at the table and the groups that those negotiators represent. When groups and institutions are represented by individuals negotiating on their behalf, those individuals must have the representational capacity to speak for the larger group and (perhaps after appropriate checking back) commit the larger group to an agreement. Those negotiating for one party suppose that those negotiating for the other are properly authorized to speak for it and to commit to resolutions and policies on its behalf. Trust is also involved at this stage: each party must have confidence in the institutional capacities and integrity of the other to select and authorize representatives who are competent and possess integrity to be able to carry out the negotiating process and secure its implementation. Trust at the negotiating table will depend not only on the interactions of negotiators, but also on the higher-level relationships of governments and groups and on the day-to-day working relations between the parties.

Another important dimension is the capacity to ensure the implementation of any agreement that might be reached. Consider as an illustration, this simple case. A department head negotiates with an independent scholar about the prospect of her becoming an adjunct professor in his department. He tells her that such a position, though unsalaried, would make her eligible to apply for research grants, which should give her an incentive to accept it. When the scholar seeks further about these grants, she is told by the Assistant Dean that adjunct professors are not eligible to apply for them. She goes back to the department head, seeking clarification. Now busy examining applications for salaried positions, he fails to respond to her enquiries. She feels hurt and insulted and comes to question their entire negotiation because she fears that he will not be able to deliver what he has promised. She continues to regard him as sincere at some superficial level – she does not distrust to the point of believing that he was deliberately lying when he said these things, and she does believe that he wanted them to reach an agreement. But his failure to clarify, or even to respond to her requests that he do so, is an indication of lack of practical seriousness, lack of concern for her interests and needs, and some amount of disrespect. Given this lack of practical follow-through, she will come to doubt the depth of his commitment. If their negotiations begin again, she is likely to have little confidence in him or in the process they undertake together.

To summarize, an *ethically conducted negotiation* between two parties has the following features, all of which require a *contextualized trust* between them.

(a) The parties are negotiating in good faith and each assumes that the other is doing so.
(b) The parties are honest with each other in sharing relevant information, and each assumes the other is basically honest in this regard.

(c) The parties stand in a relationship of respect and reciprocity and are not seeking to exploit or manipulate each other.
(d) The parties are appropriately represented at the negotiating table; that is, those representing a larger group are properly authorized to do so.
(e) The parties seriously commit to the implementation of agreements reached.

Distrust may exist, and trust may seem unstable, but distrust should never be regarded as inevitable or fixed. There are grounds for optimism about trust in the negotiating process: any negotiation is characterized by enough trust to get the parties to the table, and realistic and grounded trust can be built from patterns of modest success.

Criticisms Considered

At this point, I will pause to anticipate two criticisms of this account. Both raise the issue of idealism and realism or, if you like, of the disparities between an ethical analysis and one presented in terms of power.

The first criticism is that people do in fact negotiate when some of these ethical and trust-enhancing conditions are missing. Those who have participated long and hard in negotiations may read this description of negotiation ethics and conclude that their work did not measure up in some way. When there is such a difference between theory and practice, it may be attributable either to a deficiency in the theory or to a deficiency in the practice. Ultimately, it is for practitioners to say whether the ethical model described here is useful. In the absence of very strong arguments to the contrary, though, I would say this: if people have in fact negotiated with others who were deceptive, or manipulative, or who failed to keep commitments, or gave every evidence of not really wishing to reach an agreement – then that does not prove there is something wrong with our ethics of negotiating. Rather, it points to a flawed process. One should try somehow to improve that process in the respects in question or, if that is not possible, make a hard decision as to whether this sort of negotiation is better than none at all.

The second criticism is that the model of negotiation that is assumed here is that of the Harvard Negotiation Project. While these theorists, through their extensive training programs and widely used publications (*Getting to Yes* by Roger Fisher and William Ury and *Getting Together* by Roger Fisher and Scott Brown) have had an enormous influence on the study and practice of conflict resolution and negotiation, it would be an understatement to admit that many parties do not conduct negotiations in the way they recommend. Someone not schooled in a collaborative model of negotiation such as this one would likely resist the present account and argue that negotiation is not about collaboration at all. Rather, such a critic might urge, negotiation is about competition and power and getting the most and the best for yourself or the party you represent. If there is such a thing as an ethics of more 'realistic' or power-oriented negotiation, would that ethic not have to be very different from the ethic just articulated here? Real negotiations are competitive and in fundamental respects adversarial – it is a kind of rosy idealistic myth to think that parties negotiating could be collaborators or partners rather than opponents.

Roger Fisher and the many other proponents of collaborative models of negotiation would have us regard negotiating parties as collaborators working together to solve shared problems. Extending the attractive promise of 'win/win' solutions, such models have attracted an enormous following around the world. But what if their underlying assumptions are too idealistic to bear the realities of power and greed? What if negotiation is an inherently and irretrievably adversarial process? What then? Any 'ethic' of power negotiation would an 'ethic' of how best to fight for one's own interests, while being superficially polite and sometimes seeming not to do so. As such, it might condone bluffing, deception, hiding information, manipulating, exploiting, outright lying, and – in the end – betrayal. On a power model of negotiation, the parties are not collaborating partners, but rather, competitive opponents. Agreements will not be 'win/win'; they will be 'win/lose'. Each party will be out for itself, will want to win, and will be willing to see the other party lose in order to do so.

It can and will be alleged that the 'win/win' collaborative model is unrealistic and that any ethical analysis that presupposes that model as its base is inapplicable to real negotiations. What can be said in reply to this very basic criticism? (a) Even in a collaboratively constructed and conducted negotiation, there are bound to be elements of disagreement, adversariality, and intent to pursue one's own interests. (b) I will admit that, insofar as these adversarial aspects of the negotiating relationship will very likely encourage or tempt parties to cover up relevant information, or deceive, pressure, or threaten each other, they will tend to undermine trust. Thus, negotiation contexts are contexts in which ***trust will be unstable*** for the parties. (c) No one should assume that it is likely, or even possible, for every negotiation to issue in a 'win/win.' Rather, I would argue for a modified procedural claim, on behalf of a collaborative, ethical style of negotiation. *Ethically conducted negotiations are more likely than others to create and sustain the sound and trusting relationships that will be needed for the serious implementation of any agreement, for effective negotiations in the future, and for co-operation and reconciliation away from the negotiating table.*

Native/non-Native Relationships

I turn now to the context at hand, that of negotiations, treaties, and relationships between Native and non-Native Canadians.

A fundamental human need is the need for **respect**. Human rights, as set down in documents such as the *United Nations Declaration* of 1948 and the *Canadian Charter of Rights and Freedoms* (1982) are founded on the dignity and worth of the human being. Although the argument is more implicit than explicit, such documents are articulations of basic rights for human beings grounded on the presupposition there is something special about human beings that is the foundation for these rights. The foundation is the claim that regardless of culture, creed, racial or national origin, sex, gender identification, age, or socio-economic status, *all* human beings have this *worth and dignity*. It is grounded in what we are – beings capable of feeling, thinking, valuing, choosing, and expressing our individual and cultural values in the way we choose to give meaning to our lives. In contexts of negotiation, as in every other human interaction, we owe each other this fundamental respect.

Logically and philosophically, the rhetoric of human rights commits us to respect for each other as human persons who are equals in a fundamental, spiritual, and ethical sense. I believe that the contemporary commitment to human rights commits us to what philosophers have referred to as an *ethic of respect for persons*. To respect someone is to have the attitude that he or she has worth and dignity, is a valuable being in himself or herself, and deserves to be treated accordingly. As a being worthy of respect, a person merits acknowledgement, attention, and restoration; he or she should not be insulted, humiliated, or reduced to a stereotype. As human beings, as persons who are reflecting and choosing moral agents every human being – whether Black, White or Yellow, male or female, old or young, Aboriginal or non-Aboriginal – is entitled to this kind of fundamental respect.

Respect does not stop here: it has two further dimensions highly relevant to the context of Aboriginal/non-Aboriginal relationships. As human beings, we are more than abstract agents. We are members of cultural groups, and we are also individuals with particular life histories and values. As members of cultural groups, we seek for those groups recognition and respect for their characteristics, achievements, and place in the world. We are not only members of cultural groups, we are individuals with identities of our own. During the 19th century, White cultures generally supported slavery, but at the same time it was abolitionist White men and women from those same cultures who struggled against it and brought it to its near-end.

Thus, respect can be considered under three dimensions: first, respect for a person as a *moral agent* having dignity and capable of choice; second, respect for a person as a member of a *culture* with its own values and traditions; third, respect for a person as an *individual* with his or her own history and accomplishments, not to be reduced to a stereotype. To fail to respect a person in any of these dimensions will be fundamentally damaging to relationships with him or her.

That we want and need to be respected and will be profoundly insulted when we are treated with disrespect may seem merely a matter of common sense. Ethically, these are matters of common sense. But, nevertheless, there are many ways – subtle and not so subtle – in which we may indicate disrespect. We can fail to consult, fail to acknowledge, assume that we know what the other needs. We can denigrate a culture, conceptualizing it as a lower form that must be going somewhere else, or will have to be assimilated to something greater. And we can stereotype individuals, failing to respond to their personal capacities and histories, and labelling them in terms of what we assume we know about a group as a whole. As a matter of theory and principle, the call for respect for persons as expressed in doctrines of human rights, and its fundamental role in a civil society and state respective of human rights seem obvious and even mundane. But the sad truth is that words, actions, and policies genuinely expressive of such respect are far from mundane. To respect others and to effectively express that respect are difficult matters, especially for those separated by culture, history, and economics.

Closely related to respect is **acknowledgement**. The 1996 report on Aboriginal peoples calls repeatedly for acknowledgement by mainstream Canadian society of the material and cultural contributions of Aboriginal Canadians, as well as of the material and psychic hardship many have experienced in the wake of colonialism, attempted assimilation, loss of land, and cultural dislocation. This call for acknowledgement was presumably issued because it was the view of the commissioners that such acknowledgement is generally lacking in non-Native Canadian society. Acknowledgement, or recognition, is fundamental to negotiations as establishing an honest starting point from which some kind of reconciliation might begin. Treaties are needed because of cultural and material inequities. If negotiators – and still more broadly the governments and peoples they ultimately represent – fail to acknowledge the values, practices, and policies that have led to those inequities, there will be only the barest basis for negotiation, and no reasonable grounds for hope that negotiated treaties will improve well-being and establish better relationships. The acknowledgement of what has been, what amounts to a problem, what has structured this history, who has suffered and been harmed, and in what ways, is crucial to the process of negotiations.

One might wish to put the past at the door of the negotiating room and work to address the future. However, for those who have benefited from past injustices to ask those who have suffered from them to disregard the past is, in the final analysis, disrespectful and a failure to acknowledge the serious and enduring effect of past wrongs. The aspect of disrespect is revealed in the selective bias of this perspective: Aboriginal negotiators are supposed to leave the past behind them, at the door, while non-Aboriginal negotiators speaking for (predominantly) White governments insist that they have sovereign power over the land, thus bringing into the room not to be questioned this absolutely central aspect of what they take to be their rightful heritage. In any event, the notion of putting the past at the door, of somehow disregarding it in negotiation, is an impossible fiction. The past has been a central and defining feature in structuring the culture, group, and individual – and in shaping the entire present world. The past is embodied in the present, and it is from the present that negotiators must begin when they seek to move forward to make a better future. Acknowledgement of the past and of past wrongs, in areas such as land use and control, manipulative treaties, broken promises, cultural arrogance, and physical and sexual abuse in residential schools, is a fundamental dimension of respect for Aboriginal cultures, groups, and individuals. One cannot ignore that past and connect with Aboriginal peoples and people as they are today. It is this history, this arrogance and these presumptions, these wrongs, these deprivations, and this alienation and suffering that have created the context for the negotiations.

It is, in the end, past wrongs that present negotiations are intended to redress. To the extent that there is a failure to acknowledge the *wrongfulness* of factors such as racism, colonial arrogance, manipulative practices in negotiating historical treaties, exploitation, and crudely attempted cultural assimilation, the background for negotiations will be flawed. The failure to acknowledge the historical and moral truth about relationships between Aboriginal and non-Aboriginal peoples in our country will leave an unbridgeable gap.

Why is acknowledgement in this sense so important? Relevant at this point is the African concept of *ubuntu*, according to which a person is a person only through relationships with others. Someone who is not respected and acknowledged for what he is can of course insist to himself that he is this, *this* is what he is – and he is this whatever others say about it. And so too for a group: people can say to each other that this group just *does* have valuable traditions and practices, it just ***does*** have this past of suffering and struggle – no matter how others respond to it. Such stoic isolationism is possible for some strong-minded people who are able to maintain their dignity no matter how much people denigrate or ignore them. But because human beings develop their knowledge and characters and exist through relationships with others, isolationism of this heroic variety will be enormously difficult for most individuals and groups. As is so often said nowadays, we construct our social reality, and we do it together. Most of us, most of the time, cannot help but respond to and act within a web of expectations that others have about us. A woman may believe that she is a good and conscientious mother, but if her children, husband, parents, and community do not regard her this way – if they fail to consider or in any way acknowledge what she does, or if they indicate in words or actions that they think it is without value on the grounds, for instance, that it is without obvious monetary value – she will have the greatest difficulty maintaining her conviction and any sense of self-worth that is based on it. Analogously, it will be hard for members of a Native culture to value its cultural practices if those practices are mocked or de-valued by others outside the culture. The enormous importance of respect and acknowledgement is due to the fact that the roles we take, the positions we occupy in this world, the things we are capable of doing, ultimately, even the thoughts and feelings we have in our most private selves, are fundamentally related to other people – to interactions, expectations, practices, and responses. We are interdependent even in our understanding and valuing of our own selves. Stoic isolation is rare and difficult, if possible at all. And that is one of the fundamental reasons why acknowledgement is important.

In addition, there is a fundamental sense in which persons not respected and acknowledged by others cannot fully and honestly interact with those others. The denial of fundamental aspects of our histories and identities, the pretense that unpleasant or shameful things never happened or were never done, will present a barrier and imply a lack of full engagement; these will stand in the way of trust, confidence, and the secure relationship needed for negotiation. One party can fail to acknowledge another by failing to recognize the significance of the other's history, culture, achievements, or position in the world. Still more radically, the failure to acknowledge expresses itself in careless obliviousness to the existence of the other party. One simply proceeds as if those others were not there at all. This most radical failure of acknowledgement, the denial of the very existence of others, was illustrated when NATO members seeking to justify low-level flying over Labrador called the lands "uninhabited" and "empty" – even though some 26,000 Innu people were living there. Such a radical and careless failure of acknowledgement is far from rare in Native/White relations – being implied in some versions of multiculturalism and in some common and banefully misleading notions as 'the discovery of America;' *terra nullius*; 'conquest,' and the idea that Canada had two founding nations, French and English.

By the time two parties reach a negotiating table, each has, in at least a minimal sense, acknowledged the existence of the other and a set of issues that has brought them to the table. Any honest and productive negotiation between two parties must involve the acknowledgement of each by the other, of each as a party having integrity and meriting respect. But acknowledgement in a deeper sense may be harder to achieve, since negotiators are human beings deeply affected by the practices and expectations of the cultures from which they emerge. As one Native negotiator said, all too often it seems that colonialism is still present at the table – and respect is not. Non-Native negotiators should not tell unjustly treated people to push ahead and bury the past. For these people, the way to go forward may be to look at the past – though that is not to deny that the culture is evolving and changing.

Within the history of relationships between Aboriginal and non-Aboriginal Canadians, there are stories of love, hope, and cooperation. But these are not the predominant elements. It would be a gross understatement to say that there are many respects in which this history has not been a positive one for Aboriginal Canadians, many of whom lost land, livelihood, independence, language, culture, and identity as a result of White settlement and manipulation. Current and future treaty negotiations take place in the context of this loss, in a society where non-Native Canadians have tended to ignore the problems, and even the very existence, of Aboriginal peoples. Few have looked hard at the kind of information set out in the 1996 report on Aboriginal peoples. Issues such as economy, environment, and inter-provincial competition have tended to keep such matters as treaty rights, compensation for abuse in residential schools, cultural preservation, and self-government rather far from the centre of the political stage.

For non-Aboriginal Canadians, this lack of focus has some short- and medium-term advantages. Prominent among these is its enabling us to persist in our denial of some fundamental truths about our own history and complicity. In such a context, the articulation and recognition needed for acknowledgement are by no means easy to reach. There are many factors that make it tempting to dismiss the other, sometimes to speak and act as though those different and 'foreign' people did not exist at all, and to ignore evidence that we have been beneficiaries of, or complicit in, serious wrongs perpetrated against them. Some of us would claim not to know about the poverty and despair experienced by so many Aboriginal Canadians. Why do we not know? Their stories are sometimes news, and some of them live among us. The answer, I think, is that we have evidence, but we have ignored it. It is noteworthy at this point that to ignore something, we must first ***notice*** it. Then we decide to ignore it. Ignoring presupposes noticing, and ignoring is based on decision and choice. Ignoring leads to ignorance, or not knowing, and not knowing provides a convenient excuse for insensitivity and inaction. What we do not attend to, we will not know – as in a case when a householder ignores a cobweb in an awkward corner and thus does not know how large, greasy, and sticky it is getting. Lack of knowledge supports denial and lack of acknowledgement which are based on willful ignorance. Sometimes, as in the case of the cobweb, it does not matter. But when people's well-being, self-respect, identities, and very lives are at stake, matters are otherwise. These things do matter; they should be acknowledged, not ignored.

Acknowledgement of wrongdoing is especially difficult, for a number of reasons. We have a conception of ourselves as fundamentally good, a notion of where we have been and where we are going in this world that is positive, and we would like to preserve this image, untarnished and unstained. Many Canadians, new and old, will be willing to identify with our history, positively constructed and built up. We can identify with a Canadian history of fur trade, exploration, pioneer struggle and hardship, settlement, growth, development, moderation and moderating, compromise, acceptance of immigrants and refugees. We are much less willing to accept a history characterized by manipulation, exploitation, deception, racism, and cruelty on the part of those who represented the ancestors of our governments today. That is not how we understand ourselves – and evidence that these aspects did characterize Native/non-Native White relations through most of our history will be unwelcome. Historical distance and unwillingness to accept this more complex historical picture provide strong temptations to disconnect from a negative past. The temptation for non-Aboriginal Canadians is to accept what may be grounds for pride, but resist and deny what would be grounds for shame. Should it turn out that Canada has been not only a nation of moderates and peacekeepers, but, in addition, a nation of racist colonialists, manipulators, and thieves, we will seek to disconnect, to disavow those elements of our national past. We will insist that we were not even alive when these things went on, and had nothing to do with them. It was not our doing, it could not have been our fault, and we should not have to pay a price now.

The price ... there might be price – and this point leads to a further important factor weighing very seriously against acknowledgement. Cost. A major reason for not wanting to acknowledge wrongdoing is that we might have to pay for it. Our populous and complex society has been built on land taken from others. We cannot undo the wrongs of the past, and we cannot remake this world which has been built upon them. How could we compensate, or even begin to compensate, for the losses and suffering that are at the very foundation of our society? Could money do the job – even if there were an inexhaustible supply of it? Fear and a sense of hopelessness may support denial and tempt us to continue in our practices of denial and avoidance.

But such temptations should be resisted. I would like to conclude here by urging that non-Aboriginal Canadians resist such temptations and respect and acknowledge the Native societies from which our country derives its very foundation. Only then have we a reasonable hope of supporting collaborative negotiations and sustaining cooperative and trusting relationships.

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VISIONS OF CERTAINTY: CHALLENGING ASSUMPTIONS

Mark L. Stevenson

"In the past, blanket extinguishment of First Nations rights, title, and privileges was used to achieve certainty. The task force rejects that approach… …Certainty can be achieved without extinguishment. The parties must strive to achieve certainty through treaties that state precisely each party's rights, duties, and jurisdiction. The negotiations will inevitably alter rights and jurisdictions. Those Aboriginal rights not specifically dealt with in a treaty should not be considered extinguished or impaired."[1]

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Introduction

There have been numerous task force reports, special reports and reports of commissions, including the Report of the Royal Commission on Aboriginal peoples, that have grappled with the issue of certainty over the last several decades.[2] While not exhaustive, the work that has been done is monumental, and it is almost trite to say that another brief essay on the topic will not likely reveal anything that has not been said before. And, while it is not my intention to simply reiterate the findings of past studies, the conclusions that I have reached are no different.

Extinguishment as a means to achieving certainty is problematic. It will not work for treaties negotiated in British Columbia in the 21st century. It is problematic because it does not address some of the very deeply rooted concerns and beliefs of the Aboriginal peoples whose rights are most affected. And, if some of the most basic elements of the treaty do not genuinely reflect a mutual agreement, then the treaty will not work. Certainty will only be a temporary illusion. This is not being said glibly, or after only light reflection, or after simply reading the reports referred to earlier. This conclusion has been reached after having had years of practical experience, in three different jurisdictions as a lawyer and negotiator involved in Aboriginal land issues.

What is Certainty?

In the context of treaty discussions, the term certainty is generally used to describe a legal technique that is intended to define with a high degree of specificity all of the rights and obligations that flow from a treaty and ensure that there remain no undefined rights outside the treaty. The certainty jargon has now replaced the less fashionable term "extinguishment" which had been used to describe the certainty provisions in earlier treaties and land claim agreements. Fundamental to the concept of certainty is the notion of a land surrender or an exchange of very specific treaty rights for the complete and absolute cession of all undefined rights to the land and the territory. This concept has been captured in the "cede release and surrender" language in the post-confederation numbered treaties and in some of the earlier modern land claims agreements.[3] And, while the language has changed in the more recent land claims agreements, and though the negotiators have genuinely attempted to grapple with the problem, the basic model is the same.

The fundamental problem boils down to two diametrically opposed views of certainty. While there is always a danger of generalizing, particularly when dealing with Aboriginal issues, the approach by at least some Aboriginal peoples has been to find a new relationship with the Crown that is intended to reconcile two different perspectives of history, sovereignty, and land ownership. It is hoped that this process of reconciliation will continue to breathe life and richness into existing rights so that these rights can survive and unfold in their full splendour. Critical to this approach is the recognition of rights that have long been held sacred. [4]

The approach of the Crown (and again it is difficult to generalize) continues to require the surrender or extinguishment of rights. Extinguishment is difficult for Aboriginal peoples to accept because it leaves their fate uncertain. Rights are extinguished for an untested treaty that will have to serve the needs of future generations. This is difficult because extinguishment is forever and the remedies respecting those extinguished rights are exhausted.[5] Oddly enough, all parties to the negotiations see certainty as a cornerstone to lasting treaties.

Perspectives of the Parties

a) Aboriginal Perspectives

Aboriginal people clearly regard certainty from a different perspective than the other parties, and regard extinguishment as completely unacceptable. There is some justice to the Aboriginal perspective. Extinguishment seems to force Aboriginal people to break with their history and their culture, and to bear the major cost of achieving certainty for all Canadians by conforming their rights to those of the majority. If it is true that Aboriginal peoples were here first, and if it is true that Aboriginal title amounts to an exclusive right that is tantamount to full ownership, then the beneficiaries of the treaties are clearly all Canadians, and certainly all residents of British Columbia. The only people having to extinguish constitutionally protected rights are the Aboriginal peoples. Treaties of extinguishment and surrender tend to make Aboriginal peoples shoulder an unequal share of the weight of history, and of the mistakes made by those governments with respect to Aboriginal people.

Some Aboriginal communities[6] have advanced concepts of certainty that are fundamentally different from those being considered in treaty negotiations by governments. These communities refer to certainty as an objective to be achieved through the development of:

- healthy communities;
- sustainable development;
- equal employment opportunities;

- strengthening of cultural and linguistic identity; and
- having objective standards to measure the success of the treaty.

These Aboriginal communities want to know, for certain, that the treaty will give them the tools they need to continue to develop in the future. Certainty does not mean the destruction or cancellation of rights, but the guarantee that promises will be kept and that their future will be secure. In order to do this, they need to link the question of certainty with objective standards that can measure the progress of development in their communities and attach accountability to reaching those standards to specific government agencies. Certainty is not about extinguishment, but about achieving goals and ensuring there will be healthy and sustainable Aboriginal communities.

In the report entitled "A New Partnership", Hon. A.C. Hamilton surveyed the views of Aboriginal peoples, governments and third parties with respect to both certainty and extinguishment. In summarizing the Aboriginal perspective, the report states:

> "For Aboriginal peoples, the purpose of treaties has always been to have their rights and their lands recognized and respected by the newcomers, and to establish a stable, peaceful, and beneficial relationship for the future. Treaties are regarded by Aboriginal peoples as sacred promises from the Crown that their way of life will continue as before, and their lands are secure, although they agree to share certain lands and resources with others… …Aboriginal peoples believe that the surrender requirement undermines fundamental rights far beyond the land itself. They see surrender, no matter how focused or limited, as an attempt to extinguish their very identity, beliefs and way of life… …They see 'certainty' as the recognition of their Aboriginal rights."[7]

b) Perspectives of the Crown

In many ways, both the federal and provincial governments have common interests with respect to certainty. At the same time, the differences are obvious. Canada has a special fiduciary obligation in its relationship with Aboriginal people that flows from both law and history. Canada will want to be cautious to ensure that whatever mechanisms are used to achieve certainty are consistent with its fiduciary responsibilities that flow from its exclusive legislative responsibilities for Indians and lands reserved for the Indians. In addition, Canada will want to ensure that whatever certainty mechanisms are agreed to be consistent with its section 35 obligations to ensure that any infringements of Aboriginal rights are justifiable, bearing in mind its role as a fiduciary, and in keeping with the "honour of the Crown".

The provincial government has its own interests to protect. The most obvious of these is its jurisdiction with respect to Crown lands and its overarching interest in the provincial economy. Both levels of government are also responsible to ensure that the interests of third parties are protected.

In various federal policy[8] and position papers the federal objectives for certainty have most often included:

- fairness, equity, mutual respect and recognition of rights;
- upholding the honour of the Crown;
- certainty with respect to the lands and resource rights for Aboriginal people and other Canadians;
- encouragement of economic development possibilities for all Canadians;
- acceptability to Aboriginal people, governments and other parties potentially affected by settlement agreements;
- consistency with the legal and political evolution of Aboriginal and treaty rights, in particular section 35 (1) of the *Constitution Act, 1982* which recognizes and affirms existing Aboriginal and treaty rights; and

- efficient and accelerated settlement of comprehensive claims, thereby lowering negotiation costs for Aboriginal people and government.

The Province has also set out its requirements for the achievement of certainty in a number of public documents.[9] These include the need to:

- respect the existing legal rights – including legal interests in lands and resources – of individuals, groups and businesses in British Columbia;
- provide all parties with a clear understanding of their rights, responsibilities and accountability;
- provide clarity for Canada, the Province and local governments in their relationships with First Nations;
- provide for clear, efficient administration by the Province of public lands and resources;
- ensure that all parties with interests in lands or resources in British Columbia have security of tenure and can plan for the future;
- provide for clear, understandable and timely processes for the acquisition and disposition of tenures by individuals or businesses; and
- be compatible with the existing land title system in British Columbia.

Challenging Assumptions

a) Nature of Aboriginal Rights

Historically, one of the underlying premises to the Crown's approach to certainty has been the notion that ultimate title is vested in the Crown and that Aboriginal title is a mere burden on the Crown's title.[10] Aboriginal title had never been viewed as a competing interest in land. It was most often described as a personal right, or a usufructory right[11] that somehow had to be dealt with in order to perfect the title of the Crown. Associated with this assumption was the belief that all grants of property interests originated from the Crown. Aboriginal rights and particularly Aboriginal title (if indeed it existed) was not an independent interest, it was a lesser interest, which could not compete with the Crown's title.

We now know that some of the assumptions at the root of the early policies respecting certainty are no longer viable. This does not mean that the need for certainty has changed, but the sands have shifted. This is problematic because the colonization of British Columbia took place on the same mistaken assumptions. The conclusion of those assumptions was that either Aboriginal rights and title were not recognized by the common law or that any such rights had been extinguished by pre-Confederation colonial land instruments. Much of the present way of doing business in the Province did not consider or account for Aboriginal rights and title. This has been complicated by the recognition and affirmation of Aboriginal rights, including Aboriginal title in section 35 of the *Constitution Act, 1982*.

b) Aboriginal Rights are Undefined

Treaties, particularly the certainty provisions are often described as an exchange of undefined Aboriginal rights for more definite treaty rights and benefits. One of the implicit assumptions has been that these rights were largely limited to traditional activities that were site-specific and something less than a proprietary interest. And, the terms Aboriginal rights and Aboriginal title were used interchangeably.

We now know that Aboriginal rights and title are much more than a bundle of site-specific rights to traditional activities. This is because, according to the law as set out in *Delgamuukw*:[12]

- unextinguished Aboriginal rights and title exist in British Columbia;
- once proved, Aboriginal title amounts to exclusive use and ownership;
- in some areas, resource development may require Aboriginal consent;
- there is an economic component to Aboriginal title that in some cases will require compensation;

- Aboriginal rights have some level of immunity from provincial legislative power because of the division of powers between the federal and provincial governments at Confederation;
- the recognition and affirmation of Aboriginal rights and title in section 35 of the *Constitution Act, 1982* raises constitutional questions and obliges both Canada and British Columbia to accommodate unextinguished Aboriginal rights.

In terms of providing more clarity, the most significant aspect of the above is the distinction between Aboriginal rights and title and the understanding that Aboriginal title is an interest in land tantamount to ownership. In addition, there have been a series of hunting and fishing cases in British Columbia that have contributed to the body of law with respect to Aboriginal rights and section 35.[13]

c) Certainty, or finality through extinguishment is a desirable and realistic objective through treaty negotiations.

According to a legal maxim for the construction of contracts, "that is certain which can be rendered certain". The problem is: How does one render certain through the treaty process, all this uncertainty?

Legal rights and obligations may be said to be sufficiently certain when it is known who can do what to whom. For this, it is necessary to determine the identification of all parties who may have rights, which may be exercised or affected in some way. It is also necessary to identify all parties' substantive rights and the correlative duties, which the exercise of rights imposes.

The parties who may have rights in a given treaty will include: the Aboriginal group that will be a party to the treaty; the federal government; the provincial government; possibly, other Aboriginal groups, including Metis and non-status Indians who may have rights affected by the treaty; municipalities (governments with authority delegated from the provincial government); and non-Aboriginal people, including both natural persons and corporations. The rights these parties may have are numerous, and perhaps indefinite.

To achieve certainty, all these groups and their associated rights must be accommodated. In addition, the governments must ensure that the rights and interest of all parties who are citizens of the province and who are not participating at the negotiating table are adequately represented and protected. This includes rights and obligations arising from the past, current rights and obligations, as well as rights and obligations for the future. Consequently, the clarity of respective rights and obligations is often difficult to discern. When considered in the property law context, the variety or sorts of things that might have to be covered and the full description of legal arrangements that are going to be required becomes mind-boggling.[14] And, a combination of all the possible individuals and groups whose interest may or may not be affected, the panoply of rights that may be involved, and the desire to create absolute certainty in a treaty, has fueled an obsession for detail. Simply put, the negotiations have become too complex.

Because of this, it is necessary to ask if certainty in its absolute sense and covering the entire panoply of rights that may or may not be affected is a realistic goal for treaty making, or is it even a desirable goal?

Treaties are not property law contracts, they are constitutional documents outlining the relationships between the parties. While there is a need for certainty, there is a greater need to be flexible in order to allow the relationship to grow and evolve with time.

d) The purpose of treaties is to secure economic certainty in British Columbia, particularly in the natural resource sector.

"Security" like "certainty" may not be possible to achieve in an absolute sense, nor is security absolutely promised by the common law. It is important to bear in mind that not all problems of tenure security relate to Aboriginal rights and title.

The situation in Musqueam, for example, relates instead to the terms of a lease and the increase of the value of land over 30 years combining to render insecure the tenures of the leaseholders. The relevant factors, which in combination render those tenures insecure, would operate whether the land was on or off Aboriginal land, though the fact that the events occurred on section 91(24) lands is a jurisdictional complication. Absolute security of tenure and certainty about the future is beyond the promise of the law.

More importantly, the type of certainty that third parties require to ensure their investments in economic development in the natural resource sector are secure is dependent on a whole series of other factors. These factors include, for example: the rise and fall of pulp and paper prices, the fluctuations of the dollar, the intricacies of the softwood lumber agreement/negotiations; the free trade agreement; emerging environmental issues; the dwindling fish stocks; the Asian economy; the price of oil; confidence in the government in power; labour issues, etc.

e) Extinguishment results in Certainty

One of the fundamental assumptions around the extinguishment model is that extinguishment results in certainty. This has become almost a legal maxim, and is seldom questioned.

It should be remembered that even in the trial decision of Chief Justice McEachern in *Delgamuukw*[15] the court held that, as a matter of law, extinguishment did not result in the absolute certainty that was expected. Rather, in accordance with the trial judge, extinguishment gave rise to fiduciary obligations. Even with extinguishment, the Province still was faced with the arduous task of implementing a consultation policy based on those fiduciary duties. More recently, in the Halfway River First Nation litigation, the B.C. Court of Appeal held that there continued to be an obligation to consult in relationship to section 35 rights.[16] It should be remembered that the Halfway River First Nation is within the Treaty No. 8 area and the operating language of the certainty provisions is similar to those of the other post-confederation numbered treaties.

The Hamilton Report referred to a number of examples in which treaties with extinguishment provisions did not result in the certainty anticipated by the Crown.[17] In addition, in R. *v. Simon* Chief Justice Dickson stated, "it may be that in certain circumstances a treaty could be terminated by a breach of one of its fundamental provisions".[18]

Further, it should be remembered that as a consequence of the trust-like relationship between the Crown and Aboriginal peoples, the Crown must act with due care and attention to the rights of Aboriginal peoples, and in accordance with their best interests. A very live question, which has yet to be answered, is whether the extinguishment provisions in a treaty would be consistent with the federal government's role as a fiduciary. This is a huge issue, which will no doubt be at the core of some future litigation if the substance of the treaty does not meet the needs of the Aboriginal party.

In addition, the fiduciary duty may impose on the Crown an obligation to have a clear idea of the rights it is extinguishing and advise the particular Aboriginal community of the details of those rights. The Crown must, perhaps, demonstrate an awareness of what it is extinguishing.

Shifting Sands

As a result of *Delgamuukw*, there are huge questions relating to the capacity of the Province to proceed with resource development on Aboriginal title lands.[19] There are issues around whether the province can regulate the use of section 91(24) lands, and we now know that Aboriginal title lands are section 91(24) lands and that Aboriginal and treaty rights fall within the "core of Indianness" that the provinces may not be able to invade. We also know that Aboriginal title has not been extinguished and that in keeping with "the honour of the Crown", where there is an infringement of Aboriginal title "compensation will ordinarily be required". There is a conflict with respect to both ownership and jurisdiction. In an article written by former Deputy Minister of Aboriginal Affairs, Doug McArthur, the author states:

> "The full extent and magnitude of this conflict in ownership and jurisdiction is seldom acknowledged by government, in part due to a fear that such acknowledgment will create a sense of crisis. However, serious analysts believe that Aboriginal title actually extends over vast amounts of valuable British Columbia Crown lands. It is also likely that this has the effect of extending federal jurisdiction to such lands, since Indian lands are the exclusive constitutional preserve of the federal government…" [20]

Delgamuukw has raised huge jurisdictional issues, ownership issues and issues related to Aboriginal participation in resource development. The sands are shifting. A number of these issues have significant implications for the way in which treaties are implemented and the nature of provincial participation in a final agreement. It is not clear that all of these issues are being taken into account in modern treaty negotiations. Extinguishment is not the solution to all of these issues.

Recognition and Reconciliation

For treaty negotiations to be successful, in British Columbia, in the 21st century, a new approach is required. It has been almost a decade since the establishment of the B.C. Claims Task Force, and none of the negotiations are near completion. The mandates of governments are not adequate, because the price demanded of Aboriginal peoples (extinguishment) is too high. But the issues are not irreconcilable, and certainty is at the heart of the debate.

To have a successful treaty process in British Columbia, the parties will have to develop a different approach to certainty. That approach will have to balance the competing perspectives of the parties. To do this, the approach will have to:

- recognize and accommodate Aboriginal peoples' constitutionally protected rights in a manner that reflects their deeply rooted concerns and beliefs about their relationship with the land and their right to govern themselves; and,

- reconcile the need for the continuing economic vitality of the province through greater:
  - (a) security of private lands and tenure holders;
  - (b) security of public lands as an economic base of the province; and
  - (c) jurisdictional certainty so that governments can exercise their authority and so that jurisdictional relationships are known and understood.

If treaty making is to succeed, the tendency to envision treaty making as "giving lands to Indians" is problematic. Aboriginal people have constitutionally protected interests in land already, so it is difficult to view treaty making as an exercise in giving land to Aboriginal people in exchange for the extinguishment of those rights to the land. It is more accurate to view treaty making as an attempt to achieve certainty by redefining the relationship of governments and Aboriginal peoples and so clarifying the different parties' rights with respect to the ownership and use of land in the province.

Treaty making is about providing a mechanism through which both the province and Canada can live up to the constitutional law of the country as declared in s. 35 of the *Constitution Act, 1982* in a manner which does not undermine the Crown's ability to govern. The certainty which treaties are required to achieve will benefit all parties, and there will be trade-offs, but treaty making is not about giving Aboriginal people anything. Though, for the most part, this often escapes the public.

This is ironic because as everyone knows, "the fact is that when the settlers came, the Indians were here, organized in societies and occupying the land as their forefathers had done for centuries," to borrow the words of Mr. Justice Judson in *Calder*.[21]

In B.C. treaty negotiations, a number of approaches have been proposed to address certainty, outside of the extinguishment paradigm. These approaches have been genuine attempts to address both the need to root out the concept of extinguishment from treaties, and provide all parties, including third parties with certainty for the future. They are worth revisiting. Several of these models are briefly described below.

a) Co-jurisdiction

This model envisions that the treaty will articulate a relationship of power sharing, and operate on the principle of parallelism. The model would have the Crown and Aboriginal governments with exclusive law making authority over lands and resources within their respective jurisdictions. Certainty would be achieved because each government would have exclusive authority over its own lands and its own citizens. And, where lands are shared, the jurisdiction would be shared. In some cases, on these shared lands, the existing management arrangements might be the same as they are now, even the standards might be the same, but this would have to be negotiated. The revenues would be shared. On the shared lands, third parties' interest would not be affected, but they would be subject to any re-negotiated standards.

b) Recognition Model

Pursuant to this model, the treaty would recognize and acknowledge the Aboriginal rights of the participating First Nation. While all Aboriginal rights would be recognized, not all Aboriginal rights would be exercised. But, there would be a clear commitment not to exercise Aboriginal rights except in a manner consistent with the agreement. Because, under this model, Aboriginal rights continue to exist, certainty requires that the treaty address itself to the circumstances under which Aboriginal rights become exercisable again. The model thus has the potential to allow an evolving relationship between the parties. It may lack finality, but absolute finality may be impossible.

c) Fundamental Breach

This is similar to the previous model. Under this model, all rights would not have to be exhaustively defined in the treaty. The undefined Aboriginal rights would not be exercised unless there was a fundamental breach of the treaty. If there was a fundamental breach, the Aboriginal rights would be revived and room would be made for these rights to be exercised fully.

This would entail a discussion of what is a fundamental breach, the process for determining if in fact there has been a fundamental breach, and agreement around the remedies. There would also have to be a full discussion of what happens to those parts of the treaty that have not been breached, in a fundamental way.

d) Exhaustive Definition Model

This model would seek to define exhaustively the section 35 rights of the particular Aboriginal group in question. A variation of this is to define exhaustively the rights and obligations of the Aboriginal group, the federal and provincial governments and third parties.

It must be said, first of all, that this is a daunting task. A possible objection to the model may be that the definition of Aboriginal rights is a question of law, which the parties cannot answer. However, the definition of Aboriginal rights is dependent on evidence, and it may be that by agreeing in the treaty and in its implementing legislation that, for example, in a given area the occupation of the Aboriginal group in question was exclusive, or shared exclusive, or non exclusive, then certain conclusions of law would follow. This may necessitate the participation or agreement of various Aboriginal groups where claims overlap.

All of the above models would have to be combined with a dispute resolution mechanism, a process for judicial review and amendment provisions as a part of the treaty. There could also be perhaps a specialized treaty tribunal to deal with differences that the dispute resolution mechanism developed by the parties could not resolve. This type of tribunal has been discussed extensively in the RCAP Report.[22]

While this does not exhaust the list of models that have been proposed,[23] nor does it do justice to any of the models, it does give a sampling of some options that have been put forward in the context of treaty negotiations in British Columbia. And though none of these models may satisfy all parties, it simply demonstrates that there are options that require serious discussion if the parties are genuinely interested in seeking solutions. At a minimum, the parties should be able to agree to the principles that ought to guide the parties in their search for solutions.

In the development of these principles, the primary question that needs to be asked is: **Does the model, in substance, allow for the continued survival of the full body of rights, which are a fundamental part of the traditions and beliefs of the particular Aboriginal community?** Related to this, it must be determined if, in spite of the language used, does the model, in substance, call for surrender or extinguishment of rights not defined in the treaty?

There are several subsidiary but no less important questions, which will also have to be answered. These include:

- What are the implications for each model for the legal status of the land in the Province, including Crown land, fee-simple land and Aboriginal title lands?
- What are the practical implications of each model in areas such as resource management activities, the acquisition or disposition of rights to lands and resources?
- To what extent does the model provide greater jurisdictional certainty?
- What are the implications of each option with respect to overlapping Aboriginal territories?

All of these models must ultimately be evaluated in terms of the Crown's main concerns with respect to certainty, including the interests of third parties. The fundamental question which must be asked is: **Does the model provide greater certainty to the Crown and third parties than exists in today's legal and political environment, without treaties?**

In this context, further questions that must be considered are:

- To what extent is the model compatible with a modern provincial economy?
- To what extent does the model provide greater security to the tenure holders and fee-simple landowners of British Columbia?
- Does the model leave citizens of British Columbia more secure in their employment and leave the province more secure in the use of the economic base of public lands, than under the current uncertainties?
- Does the model leave the Crown secure in the exercise of its own authority and define jurisdictional relationships between the province, the federal government and Aboriginal peoples?

With respect to the federal Crown, additional questions will have to be asked. The fundamental question is: **Is the model consistent with the overarching charge of the federal government as a fiduciary, flowing from its legislative responsibilities pursuant to section 91(24)?** In addition, both governments will have to ask if the model is consistent with the recognition and affirmation of section 35 rights.

Conclusion

Over the past decades, there have been numerous reviews of land claims issues, including the certainty issue. Each one of these reviews has called for rooting out the concept of extinguishment from treaty negotiations. Notwithstanding, extinguishment remains as a cornerstone to the policies pursued by the Crown in treaty negotiations. Though negotiators have attempted to grapple with this issue, treaties and modern land claims agreements have continued to require the extinguishment or surrender of Aboriginal rights in exchange for defined treaty rights.

For treaties to work in British Columbia in the 21st century, the approach to certainty will have to change. It has been almost a decade since the B.C. Task Force report was issued, and none of the claims in the BCTC process is near being resolved. Quite simply, the mandates of governments are insufficient because the price being demanded from Aboriginal peoples by governments is too high. At the heart of resolving many of the key issues is the question of certainty.

An approach to certainty will have to be developed that accommodates the deeply rooted beliefs of Aboriginal peoples regarding their relationship with the land and their right to govern. This approach will have to expunge the concept of extinguishment from the treaty. At the same time, the approach will have to address the very real concerns of the Crown and third parties. The approach will have to be consistent with the "recognition and affirmation" language in section 35 of the *Constitution Act, 1982* and provide greater certainty to all parties than exists today without treaties.

In order to do this, there will have to be a genuine attempt to rethink the model, taking into account the interests of all parties, and the huge changes in the law that have occurred over the last several years. The review will have to be coupled with a political commitment to the process and an appreciation for the amount of uncertainty that exists without treaties. The review will also have to take into account that treaties are constitutional documents and not property law contracts and that the solutions must be flexible, and not necessarily final. And, the commitment will have to be more than to simply look for new words to describe the old approach. The commitment must be to a new approach. If this is not done, it is not likely that agreements reached in the future will reflect the genuine and deeply rooted concerns of the Aboriginal peoples participating in the negotiations whose rights are most affected. If this is the case, notwithstanding the language of the treaty, certainty will be no more than a temporary illusion.

REFERENCE NOTES

[1] The *Report of the British Columbia Claims Task Force* (June 28, 1991) at 29.

[2] These reports include *A New Partnership* (Hamilton Report); the *Report of the Royal Commission on Aboriginal Affairs* (including the interim report entitled Treaty Making in the Spirit of Co-existence); the Penner Report; the Coolican Report; the British Columbia Claims Task Force Report; and related Reports of the Canadian Human Rights Reports (1990 and 1991 Annual Reports). In addition, there have been numerous background academic pieces written for these Reports and Commissions including "A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements: A Report Prepared for the Royal Commission on Aboriginal Peoples". And, this list does not include the various published and unpublished government policy papers and the internal work done by many of the negotiating teams involved in land claims negotiations.

[3] See the *James Bay and Northern Quebec Agreement* (Éditeur Officiel du Québec 1976) clause 2.1 which states "The James Bay Cree and the Inuit of Quebec hereby cede, release, surrender and convey all their native claims, rights, titles and interest, whatever they may be, in and to land in the Territory and in Quebec"; see also *The Inuvialuit Final Agreement* (Ottawa, Department of Indian and Northern Affairs 1984) clause 3(4) which states "The Inhuvialuit cede, release, surrender and convey all their Aboriginal claims, rights, title and interest, whatever they may be, in and to the Northwest Territories and Yukon Territory and adjacent offshore areas..."

[4] For a more complete survey of the Aboriginal perspective, see *A New Partnership*; Report of Hon. A.C. Hamilton, Fact Finder for Minister of Indian Affairs and Northern Development (Ottawa, Public Works and Supply and Services Canada, 1995) at 47-53 [hereinafter *Hamilton Report*]; and Canada, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa, Supply and Services Canada, 1995) at 9-15.

[5] Black's Law Dictionary defines extinguishment as "The cessation or cancellation of some right or interest."

[6] See objectives pursued by some of the Tsimshian First Nations in negotiations being conducted by the Tsimshian Tribal Council.

[7] *Hamilcon Report, supra*, note at 41-42.

[8] See for example, *In All Fairness: A Native Claims Policy*, (Ottawa, Indian and Northern Affairs, 1981); Comprehensive Land Claims Policy, (Ottawa, Indian and Northern Affairs, 1986).

[9] See generally, B.C.'s Approach to Treaty Negotiations; and, B.C.'s Approach to Lands and Resources.

[10] *St Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46.

[11] Black's Law Dictionary describes "usufruct" as "A right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time."

[12] *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R. 1011.

[13] See for example, R v. *Gladstone,* [1996] 2 S.C.R. 723.

[14] Under its discussion of property, the Blackwell Encyclopedia of Political Thought contains the following:

> "As a social institution, property has exhibited great variety both in the sorts of things it has encompassed and in the ways in which the relation between the person and the object of property has been conceived. A full description of the legal arrangements governing property in any particular society would necessarily be complicated by these facts. As a contributor to a 19th century encyclopedia observed;
>
>> 'A complete view of property, as recognized by any given system of law, would embrace the following heads, which it would be necessary to exhaust, in order that the view should be complete. It would embrace an enumeration of all the kinds and class of things which are the objects of property: the exposition of the greatest amount of power over things which a man can legally exercise; and, connected with this, the different interests which persons may have in a thing which is the object property; the modes in which property is legally transferred from one person to another, or acquired or lost; the capacity of particular classes of person to acquire and transfer property as above understood, or to take the other view of this division, and enumeration of persons who labor under legal incapacities as to the acquisition and loss of property. (National Cyclopedia of Useful Knowledge, vol. IX, page 871.)'

We might conclude that such an account of a legal property system would exhaust the researcher as well as the headings listed by this Encyclopedist."

[15] *Delgamuukw* v. *The Queen,* [1991] 3 W.W.R. 97 (B.C. S.C.).

[16] *Halfway River First Nation* v. *British Columbia* [1999] 4 C.N.L.R. 1.

[17] *See Hamilton Report, supra* note 4 at 40 in which Justice Hamilton refers to the *Eastman Band* v. *Gilpin* where the provincial court agreed (after considering the James Bay and Northern Quebec Agreement (James Bay) the federal implementing legislation and the Cree Naskapi (of Quebec) that the 'Cree hold some sort of residual sovereignty as regards their local government.'

[18] R. v. *Simon* [1985] 2 S.C.R. 387 at 404.

[19] For a fuller discussion of this, see K. McNeil, "Aboriginal title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431.

[20] D. McArthur, *Treaty Making: Is the Theory Faulty*? U.B.C., January 21, 2000 [unpublished].

[21] *Calder* v. *A.G. of British Columbia*, [1973] S.C.R. 313.

[22] *Report of the Royal Commission on Aboriginal Peoples; Restructuring the Relationship*, vol. 2 (Ottawa, Supply and Services Canada, 1996). See in particular Recommendation 2.4.29 at 592.

[23] In particular, see the approach suggested in the *Hamilton Report, supra* note 4 at 114, which included the following six elements:

- The recognition in the preamble that the Aboriginal party to the treaty has Aboriginal rights in the area;
- Setting out in as much detail as possible, the land and resource rights of each of the parties to the treaty and of others affected by it:
- Mutual assurance clauses in which the parties agree that they will abide by the treaty and will only exercise land and resource rights as set out in the treaty;
- A dispute resolution process with broad powers, including binding arbitration and judicial review, to ensure the treaty obligations are met and disagreements about the treaty can be addressed:
- A workable amendment process whereby the parties can, if they agree, amend certain provisions of the treaty to respond to changing circumstances.

NEW ZEALAND'S INTERIM TREATY SETTLEMENTS AND ARRANGEMENTS – BUILDING BLOCKS OF CERTAINTY

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In the last decade, Price has focused his research on negotiation processes involving Idigenous peoples' representatives and the Crown in both New Zealand and Canada. Professor Price has also worked as a professional consultant in the areas of research, training, and facilitation with First Nations and other governments and organizations in Canada.

Introduction

Treaty relationship building is a long-term and difficult process fraught with conflicting perceptions of the other Treaty partners at the table. In this context of treaty relationship building, interim treaty settlements and arrangements can symbolize goodwill and trust, as well as representing a concrete transfer of assets from the Crown to its indigenous treaty partners. These interim treaty agreements might be viewed as building blocks of certainty. In this paper, I contend that we have something to learn from the modern New Zealand experience with interim treaty settlements and arrangements. The benefits for Maori tribes and New Zealand included: increased goodwill on all sides, a positive change in the negotiating climate, new assets of land and/or resources to be used by Maori tribes sooner rather than later, and putting Maori-initiated litigation on hold.

Evidence that interim treaty settlements and arrangements might well have relevance for the B.C. treaty process is found in the most recent annual report of the British Columbia Treaty Commission:

> "The Supreme Court of Canada decision in the *Delgamuukw* case in December 1997 and its confirmation of Aboriginal title heightened First Nations expectations that their concerns would be addressed. Resolving issues around the land and resources sooner rather than later will restore confidence in the treaty process. ...Over the past several years, as negotiations proceed and frustrations and expectations rise, the need for interim measures that protect First Nations interests in land has become more pressing."[1]

Moreover, the acrimonious nature of the recent and likely continuing debate over the merits of the treaties, such as the Nisga'a treaty, indicate the need to review the current methods of handling some of these more urgent and sensitive treaty issues. The treaty forum organizers have requested that I present some of New Zealand's recent experience in treaty process negotiations as a way of expanding our ways of thinking about these issues in British Columbia and Canada.

A question may arise as to whether it is a wise idea to do a comparison between New Zealand and Canada, given our different histories and the fact that there is a national government there but no provincial governments. That is a fair question, but while an understanding of history is essential in both instances, there are certainly similarities in the modern democracies of New Zealand and Canada which make the comparison fruitful. For example, both countries have similar links to the British parliamentary system and common law traditions. In this context, the most important similarity underlying both situations is the common quest of the Indigenous peoples (Maori and First Nations) to achieve recognition, respect, reciprocity, and a more equitable sharing of control of land, resources and decision-making with governments representing the Crown.[2] Based on my research to date, both Canada and New Zealand can learn from the experiences of the other country.

Part One: Highlights of the Context for Maori – Crown Treaty Relations in New Zealand

A brief sketch of a few key historical milestones in New Zealand will assist us in understanding the current situation there. In 1840, the Treaty of Waitangi was negotiated between Maori representatives and the British Crown. Part of the treaty negotiations involved the promise of a continuing relationship between the British Crown and the Maori Chiefs. The Crown was represented by Governor Hobson, and he, in turn, held out the promise of a strong relationship between Maori and a personalized and caring authority, namely the newly-crowned Queen Victoria.[3] This treaty had both an English version and a Maori translation, and was eventually signed by over 500 Chiefs all over New Zealand. As it turned out, the two versions differed slightly but significantly in relation to key words dealing with Crown sovereignty and chiefly authority in the Maori translation. For example, the Maori word for governance instead of sovereignty was used in article one, and a very strong Maori word for chiefly authority "tino rangatiratanga" was used in article two. The differences in article two versions of the treaty are illustrated below with the Maori translation reading:

> The Queen of England agrees to protect the Chiefs, the sub tribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell their land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent. (English translation of the Maori treaty text by Professor I. H. Kawharu).[4]

The English text of the second article reads as follows:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or

> individually possess so long as it is their desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.[5]

Modern Maori treaty grievances have very often been linked to the implementation and interpretation of this second article.[6]

Historian Alan Ward discusses the importance of the treaty and the basis for subsequent Maori treaty claims in the following way:

> The Treaty of Waitangi was a solemn compact between Maori chiefs (rangatira) and the British Crown to build a nation by their joint endeavours. The chiefs acknowledged the overarching authority of the Crown in return for recognition of the *tino rangatiratanga* of the chiefs, tribes and people, and promises of royal protection, including Maori property rights. However, in order to make way for white settlement, the Crown acquired the land in ways that increasingly breached the principles of the Treaty and marginalised the Maori. The *Treaty of Waitangi Act*, which established the Waitangi Tribunal, provided due process for the hearing of Maori claims of injury as a result of treaty breaches.[7]

While many breach of treaty claims were put forward by Maori tribes in the 19th century, the past two and one half decades have held the most promise for overcoming the grievances, because these tribes can now petition for a hearing before the Waitangi Tribunal. Since 1985, the tribunal has been able to examine claims dating back to 1840.[8] The courts in New Zealand have also been increasingly called upon to make decisions related to the treaty and its principles of modern interpretation as well as breach of treaty claims.

Treaty claims really came to the forefront of the mainstream agenda in the mid 1980s. The New Zealand Labour Party government adopted a set of policies that were designed to overcome some of their real economic problems, including a large foreign debt, but, at the same time, wished to give recognition to the Treaty of Waitangi. Thus, their economic policy and their treaty policy tended to be contradictory. One part of the government's economic strategy involved setting up through legislation State Owned Enterprises (similar to Crown Corporations) and then moving the Crown owned assets, including lands, minerals and forests into these new enterprises. However, Maori were suspicious that the government plan was that many of these assets would later be sold to the private sector (this privatization did happen subsequently). This process was a source of real concern for Maori tribes and organizations who believed once the assets were sold off, there would be little left to settle their treaty claims. Consequently, they intervened in the courts to restrain the government.

In a related development, the government brought changes to fisheries legislation and policy in the form of strategies designed to rationalize the fishing industry by cutting out small commercial operators (including a lot of Maori fishermen), while tending to favour large commercial fishing interests. Fish exports had become a big source of income for the government in the early 1980s, and they introduced a new system of Quota Management and Individual Transferable Quota which could be bought and sold. Again Maori tribes, especially traditional fishing tribes like the Ngai Tahu in the south and Muriwhenua in the north, saw the fishing resource slipping away before their eyes (see map at the end of the paper for the locations of these tribes).

Fortunately, Maori lobbyists were successful in getting the government to agree, in several key pieces of legislation passed in this period, that the authorized activities under the legislation should not be contrary to "the principles of the Treaty of Waitangi".[9] This phrase was later the basis for court interventions by Maori and other actions before the Waitangi Tribunal in the latter half of the 1980s and into the following decade. Maori treaty concerns related to land, resources, and fisheries were at issue. Over time, the Waitangi Tribunal and the courts came to interpret the principles of the Treaty to mean the "still-living 'spirit'" of the treaty with emphasis on the intentions of the parties rather than the precise details.[10]

In many instances, the Maori tribes were successful, as the Waitangi Tribunal made favourable recommendations, and the Courts urged the government to *negotiate* these issues rather than make unilateral decisions. For example, a pivotal court case in 1987 referred to as the 'Lands case' or 'Maori Council case' set the stage for a new negotiation milieu and to some extent protected lands, which were subject to treaty claims.[11] In this Court of Appeal decision the President, Robin Cooke, stated that the five judges had reached two overall conclusions:

> First that the principles of the Treaty of Waitangi override everything else in the *State Owned Enterprises Act.* Second, that those principles require that Pakeha (European) and Maori Treaty partners to act towards each other reasonably and with the utmost of good faith.[12] (my translation of the Maori word in brackets)

This court decision initiated new negotiations and eventually new legislation. *The Treaty of Waitangi (State Enterprises) Act of 1988* would include protective measures to overcome some of the problems, because the new Act:

> gave the Tribunal greatly increased powers in respect of Crown land transferred to SOEs (State Owned Enterprises). It provided that all such land, when privatized, would carry a memorial on the title. If the Tribunal found that such land had been acquired in breach of Treaty, it could *order*, not merely recommend, that the government reacquire the land at current market value and return it to the Maori claimants.[13]

By the end of the 1980s and the early 1990s, governments led first by Labour and then by the National Parties turned increasingly to negotiation rather than litigation of treaty claims issues. The negotiation route made the most sense for the government, because the Maori tribes were so often successful in the courts.

I now turn to the specific sets of negotiations that led to the Interim Treaty Arrangements and Settlements and selectively examine the role of several key interim treaty settlements and arrangements as they relate to the Treaty of Waitangi claims negotiations between Maori representatives and the Crown in the late 1980s and 1990s. For land and resources issues, I will examine the experiences of the Waikato Tainui and the Ngai Tahu tribes (see map for further details). In relation to the commercial fisheries, the treaty settlement involving all Maori tribes will be discussed.

In order to more readily see the potential of interim agreements and arrangements for the Canadian situation, I would suggest that the case studies described in this paper might fall into four general categories, which are outlined below. Overall, it should be kept in mind that all the interim arrangements or settlements discussed in the paper tend to have both symbolic and practical implications. The first category is the *voluntary and unilateral gift* of title to land or resources by the Crown. The second category is a jointly developed *interim institution*, which functions as a holding mechanism for land, resources, or assets during the negotiation process only, and the institution is wound down with the implementation of the final settlement. The third category is a *property rights transfer* of assets such as forest tenures or fish quota (in the context of New Zealand). Finally, the fourth category involves *political, cultural and economic symbolism* in a transfer of assets or land or resources. Some specific studies could, in fact, have more than one category applied to them, but usually one is most applicable. These interim deals effectively represented the striking of a new balance between the interests of the Crown and Maori interests as part of the longer journeys towards final treaty settlements.

Part Two: Breach of Treaty Claims – Interim Arrangements

Interim Arrangement – Crown Land Return to the Waikato Tainui Tribe

The Waikato Tainui tribe (37,000 members, based near Hamilton on the North Island) continues the legacy of the Maori King movement. The Maori King movement originated in the 1850s, and lead the Maori resistance against further land sales to Crown agents acting for the New Zealand government. This resistance led the government by the 1860s to seek more coercive means to take the land, namely by force through the British army and complementary legislative action. These *confiscations* (raupatu) from independent Maori tribes happened in several places on the North Island, but the largest land losses were in the Taranaki area north west of Wellington and the Waikato area south of Auckland (see map at the end of the paper for further details, including other confiscation areas).[14] In 1863-64, the Waikato Tainui lost 1.2 million acres, much of which was prime agricultural land.[15]

Over time, the Waikato Tainui tribe brought forward treaty grievances over this confiscation of their land. Although steps were taken by earlier governments to offer some compensation, the tribe firmly stood its ground on the principle that "as land was taken so land should be returned".[16] In addition, the tribe sought an apology from the Crown for its wrongful confiscation actions.[17] Matters came to a head in the late 1980s when the Crown sought to sell the assets of Coalcorp. Tainui were concerned, because some of this land was within confiscation boundaries. While the Crown gave them assurances of consultation, this did not take place. The Tainui then took the matter to court and to the Waitangi Tribunal. The Court of Appeal recommended negotiations to solve the dispute and suggested that the Tainui were entitled to a "substantial portion though considerably less than half the resource...".[18] This 1989 court decision gave fresh impetus for negotiations, so the Tainui claim before the tribunal was put on hold. However, with a change of government in 1990, the treaty claim negotiation process proved to be slow and difficult.

In 1991, in his first meeting with the Waikato Tainui chief negotiator Robert Mahuta and his associates, the new Minister responsible for Treaty Negotiations, Douglas Graham, noted the sadness amongst the Tainui that their treaty claims had dragged on so long with no apparent results. Yet, he also recognized their proud determination to achieve a return of land. After negotiations went on for some time, Minister Graham sensed that the Crown side was "dragging the chain" and sought a way to provide an expression of goodwill:

> ... in 1992 I asked Cabinet to return the Hopuhopu military camp outside Ngaruawahia which had become surplus. I thought it appropriate that something at least should be seen to have been achieved. This was not an "on account" settlement. It was agreed that the camp would be returned without conditions and simply as evidence of the Crown's goodwill.[19]

Formal gift of land at Hopuhopu was made in March 1993 and the gift was regarded positively: a Tainui woman elder at the time referred to it as a "meaningful expression of goodwill" on the part of the Crown, the negotiation climate was enhanced and it was a effectively a 'win-win' situation for all concerned.[20] Title to the land was vested in Pootatu Te Wherowhero, the first Maori King. The relationship building process was launched. This interim arrangement follows most closely the voluntary, unilateral gift category, but also has symbolic aspects, in that this land was also the site of the first Maori King's headquarters.

The Waikato Tainui tribe then went on to make good use of this return of Crown land by transforming the old military buildings at Hopuhopu into their tribal headquarters with offices and meeting rooms. I visited Robert Mahuta and his associates there in 1995 and found the Tainui headquarters to be a beehive of activity with many younger members of the tribe assuming important roles. A Hopuhopu Trust was established to disburse funds for educational scholarships. Subsequently, this land has also been used for new construction projects and new programs, especially an ambitious endowed college, a sports training centre, and a Kauhanganui house for the new tribal council governing body. Before the college was developed, some of the land was also used for farming to support a dairy cow operation. The site is ideal for development because of its proximity to local Maori communities at Huntly and Ngaruawhia.

The final settlement came in 1995, and it included the return of 15 690 hectares of land, an apology from the Queen, and cash compensation, bringing the total value of the settlement to $170 million. Included in the settlement were police and court buildings as well as land underlying the University of Waikato. These institutions would now have to arrange for a lease and pay rent to a new landlord, the Waikato Tainui tribe. The other major Waikato Tainui claim relating to the Waikato river has yet to be negotiated.

In a 1995 conference, Waikato Tainui chief negotiator, Robert Mahuta, provided the following reflections on the importance of Crown land return and the ambivalent nature of the conflicting signals from the Crown in their negotiations:

> The call for return of land pertains to lands owned by the Crown and not privately owned properties. The significance of having Crown owned lands returned rests in the activity of the last century wherein the Crown through its armed forces took the tribal estate from the people. It is symbolic that it is now Crown lands that should be returned. Important also is the approach the parties took to each other. Goodwill is part and parcel of any negotiation when a durable resolution is being sought. It also ensures that progress can be made without distrust. In 1989, at the Court of Appeal hearing, the Crown produced an affidavit citing its Crown holdings at 163 000 acres. Today the quantum of land is 93 000 acres. The diminution of what was under claim, whether defendable or not, had the effect of polarizing the parties into the role of respectful adversaries.[21]

Clearly, for Mahuta the importance of goodwill and trust in negotiations, produced through the interim arrangement of the return of Crown land, was counterbalanced to some extent by the fact that the Crown continued to sell off surplus land. According to Minister Graham, "the government desperately needed the land from these sales to be used in other areas. It could not be frozen in time."[22] The impact on the Tainui and Taranaki tribes of the loss of Crown land under claim is described by Historian Ann Parsonson:

> I can remember the sadness and sense of resignation among claimant iwi (tribes) of Taranaki – I won't say disbelief, for the tribes did not seem at that time to have high expectations of the Crown – when Crown land was disappearing under their feet while Tribunal hearings of their claim were in progress. The same thing was happening within the borders of Tainui territory in Waikato while the Crown and Tainui were engaged in a process of direct negotiation.
>
> I can say that in both areas the way in which Crown lands were still being disposed of during that period had a very bad effect on iwi (tribal) perceptions of the Crown; it seemed evidence of lack of good faith writ large. People were very aware of what was happening, and it tended to undermine their confidence in Crown processes quite markedly. Crown negotiators might talk of good faith, but if the Crown agencies were still just going about their business of disposing of 'surplus lands' as if Treaty settlements were nothing to do with them, it was not easy to reconcile the two.[23]

Eventually, a concept of land banking for treaty claims settlements proved to be one solution to overcome these difficulties posed by surplus Crown land disposal, and for that process we must turn to the Ngai Tahu-Crown negotiations.

Interim Arrangement – The Land Bank Process in the Crown-Ngai Tahu Negotiations

The treaty grievances of the Ngai Tahu tribe (25 000 members, South Island) originated in the post-treaty land transactions from 1844 to 1865. In that period, Crown land agents acted in contravention of the Treaty partnership by not implementing the understandings of adequate reserves of land, so that the Ngai Tahu could prosper and not be marginalized in their homeland. In addition, specific undertakings given to the Ngai Tahu by the

Crown's representatives, including the preservation of the greenstone resource (a vital trading commodity) and conservation of Ngai Tahu food gathering sources were forgotten. Since the mid 1860s, Ngai Tahu have pursued their treaty claims grievances through a variety of means, including formal complaints to Parliament and submissions to commissions of inquiry, as well as through the courts and the Waitangi Tribunal, especially in more recent years.

After an extensive review, the Waitangi Tribunal issued a report in three volumes which detailed the nature of the treaty claim and concluded :

> The predominant theme that constantly arises in the findings of the tribunal and indeed is almost as constantly conceded by the Crown, is the failure of the Crown to ensure that Ngai Tahu were left with ample land for their present and future needs.[24]

The Ngai Tahu tribe initiated negotiations with the Crown in 1991. The respective sides were headed by Maori leader Tipene O'Regan and Minister Douglas Graham. Although progress was slow in the first two years, one area of real and lasting importance was pioneered in these negotiations. In the course of negotiations in 1992-93, a *land bank* or holding pen concept was developed – a Ngai Tahu initiative which the Crown agreed to in the negotiation process. This land bank was designed to retain lands which the Ngai Tahu desired to have in their final settlement, including a number of Crown land properties and certain other parcels of land purchased for the Ngai Tahu by the Crown. Ngai Tahu was given a "right of first refusal" on surplus Crown land coming available but this right also brought with it a responsibility to research the properties to find land which might fit with their long term plans. The market value of the land bank was capped at $40 million, and once the cap was reached Ngai Tahu could substitute new parcels for older parcels as long as the cap was maintained. Among the properties included were former Crown properties of commercial value in downtown Christchurch and properties with tourist and back country hiking potential near the resort area of Queenstown. This land bank served as a trust building component by providing tangible evidence to the Ngai Tahu that the negotiation process was working.[25] The Crown was also free under this arrangement to continue selling certain properties which the Ngai Tahu had rejected as not of interest to them. This interim arrangement is the best example of the concept of an interim institution as it functioned effectively for seven or eight years, and then was shut down when the final settlement was implemented.

In May 1994, after both sides had some experience with the land bank, Ngai Tahu again took the initiative, broaching the possibility of purchasing, at market rates with their own funds, certain properties held in the land bank. This would be done in advance of the final settlement. The Crown agreed to this request assuming that Ngai Tahu needed land for its own purposes, which in some cases was accurate. For example, Ngai Tahu was able to borrow money and then purchase at market rates the Wigram air force base in Christchurch. Then the tribe was able to refurbish houses there for re-sale to Ngai Tahu members and other citizens. However, Ngai Tahu also had other ideas in mind and they promptly got organized to take advantage of what they perceived to be other good business opportunities. They hired an experienced property manager and began the process of finding buyers for desirable properties, which they would then request from the land bank. With time, they were able to match up a property coming out of their land bank with an interested buyer, and by coordinating the date of purchase with the date of sale, Ngai Tahu were able to realize profits from these sales. Apparently, the Crown was not very pleased by this profit taking development, but a deal is a deal and the Crown did themselves acquire a revenue flow from the land sales. Over time, this Ngai Tahu practice of selling parcels of land to third parties resulted in a considerable flow of revenue to Ngai Tahu, enabling the tribe to cover a portion of their on-going costs of negotiations and build up equity in their balance sheets.

Later in 1994, however, the negotiations between Ngai Tahu and the Crown broke down for a variety of reasons, including: a huge discrepancy between the two sides in the overall valuation of the treaty claim, a breakdown of the communication process, the issuance of a Crown treaty claims policy, which proved to be very controversial (especially a one billion dollar cap for all treaty claims), structural problems in the negotiation process, and personality conflicts between key negotiators.[26] It seems clear that relationship building in this type of treaty negotiation process requires continual attention and nurturing. This relationship is inherently fragile because of the often bitterly disputed Maori tribe-Crown dealings of the past century and the contemporary perceptions (on both sides) of that history.

This negotiation breakdown was followed by a series of actions by the Ngai Tahu, including a call for a hearing before the Waitangi Tribunal and a number of court actions from late 1994 until almost mid-year of 1996. Part of the incentive to re-start negotiations involved an interim settlement of the claim.

Before leaving the topic of land banks, it is important to underline that land banks also proved to be a lasting treaty process mechanism, as they were utilized in other parts of New Zealand, including the confiscation areas of the North Island (such as those areas under claim by the Taranaki tribes) and eventually covered all territory north of the Ngai Tahu claim. However, the Crown only agreed to land banks elsewhere in 1995, so this process was implemented too late to be of much assistance to the Tainui tribe.

Part Three: Breach of Treaty Claims – Interim Treaty Settlements

Interim Treaty Settlement – Return of the Greenstone and Resources to Ngai Tahu

Once the two sides had broken off negotiations, it became very difficult to re-start the process, and a stand-off for about one and one half years resulted. Both sides took increasingly aggressive actions – the Crown through moves to sell off farms and coal deposits in the South Island and Ngai Tahu through court actions, including some to prevent any Crown assets from being divested. It eventually took an intervention by Prime Minister Jim Bolger in 1996, through a meeting with Ngai Tahu leader, Tipene O'Regan, for the negotiation process to be re-started. Through a follow-up process after the meeting, the Ngai Tahu leadership agreed to an approximate amount of $170 million as a valuation of their total land and resource claim (excluding commercial fisheries).

The Ngai Tahu tribe was still desirous of ensuring that the negotiations be put on a firmer footing. To this end, they secured the Prime Minister's assistance in getting legislation through the Parliament to establish their new Tribal Council (runanga) structure. In addition, Ngai Tahu sought a mutually acceptable interim settlement of their treaty claim. The interim agreement included several key components: legislation designating that Ngai Tahu, not the Crown, was the owner of the greenstone (jade) on the South Island, a non-refundable amount of $10 million, and the vesting again through legislation of the Tutaepatu Lagoon near Christchurch with Ngai Tahu.[27] Maori refer to the South Island as Te Wai Pounamu (the Greenstone Island) and greenstone was a key trading commodity in earlier times for the Ngai Tahu tribe; hence, the return of this resource was very symbolic to them. Thus, this interim settlement presents the best example of the category of political, cultural and economic symbolism in the transfer of assets or title. The offer was not made contingent on a final agreement, but it would form part of the overall package if a deal was finally negotiated, and was thus regarded as "on account". The statement of intentions of this interim settlement expresses clearly the desires of the parties:

> this Deed is entered into as a sign of good faith by the Crown and a demonstration of the Crown's goodwill, and in the expectation that both parties will negotiate in good faith toward a comprehensive settlement of Ngai Tahu's claims and will use reasonable endeavours to remove any obstacles to such good faith negotiations proceeding.[28]

For its part, Ngai Tahu "agreed to an indefinite adjournment of certain litigation relating to the claims to allow these negotiations to take place."[29] The interim settlement was accepted by the Ngai Tahu in June 1996, thus paving the way for new negotiations and the vital rebuilding of a torn relationship. In fact, the interim settlement gave a real momentum to negotiations and the negotiation climate was much improved. The Heads of Agreement (Agreement in Principle) was signed just before the election in early October 1996.

This new process was rejuvenated through re-structured treaty negotiation teams with more emphasis on working level teams and less on the principal negotiators. It took four intense months of negotiations and much creative thinking to come up with the agreement in principle. The final deal came within one year afterwards. Key components of the final deal included an apology from the Crown, an economic redress package totalling $170 million, the symbolic return of Aoraki (Mount Cook), and a cultural redress package including traditional food-gathering. After over 90 per cent of the Ngai Tahu membership endorsed the deal in 1997, settlement legislation went through Parliament in September 1998.

Ngai Tahu and other tribes were also heavily involved with treaty commercial fisheries disputes, and the negotiations in that regard had begun at least a decade earlier.

Interim Treaty Settlement – Commercial Fisheries Quota to be held by a New Maori Fisheries Commission

In the mid 1980s, the Crown sought to restructure the commercial fishery in New Zealand through a new system of quotas – the Quota Management System – which effectively called for the development of property rights for commercial fisheries in the form of Individual Transferable Quota, which could be traded or sold. This new system came as part of the introduction of the new *Fisheries Act*, but some key Maori tribes, including Muriwhenua and Tainui in the North Island and Ngai Tahu in the South Island, sought to prevent the Crown from disposing of the fisheries assets to big commercial operators. Maori wanted their rights to this same fishery under article two of the Treaty of Waitangi to be respected and protected. Again, through actions in the court and the Waitangi Tribunal, Maori used the due process mechanisms available to them to prevent Crown actions that would be detrimental to their aspirations as fishermen. An interim injunction was granted in 1987. Justice Grieg of the High Court found that there was an arguable case for Maori treaty rights to the commercial fishery, and that the Crown must negotiate with Maori tribes regarding the reconciliation of new approaches to fisheries with Maori treaty rights.[30] A joint Maori Crown working group was struck, and the negotiations began. Maori sought 50 per cent of the fisheries resource, and the Crown was not inclined to go nearly this far. Fishing industry representatives lobbied hard against a deal with the Maori tribes.

After a long set of negotiations, which eventually involved a Parliamentary committee, the Prime Minister finally intervened to break an impasse and struck an interim deal with Maori negotiators, which resulted in the *Maori Fisheries Act* of 1989. In the words of Dr. Tipene O'Regan, one of the Maori negotiators, the results were as follows:

> As far as the overall struggle in fisheries were concerned, the key feature of this Interim Settlement was that it was interim. All litigation was adjourned *sine die* until October 1992. In return, 10 per cent of all Individual Transferable Quota in all inshore and deepwater species was to be progressively transferred to a Maori Fisheries Commission at a rate of 2.5 per cent per year and a $10 million fund to drive development was transferred.[31]

The costs of purchasing the quota were estimated to be $100 million over the four years. This interim settlement gives us the best example of the category of a transfer of property in the form of fish quota assets. In a recent lecture, O'Regan describes some of the successes of the collaborative Maori venture into commercial fishing:

> The Maori Fisheries Commission set up as a consequence of the 1989 interim settlement quite quickly took centre stage in Maori fisheries development. It was extremely successful in a commercial sense and rapidly grew the Maori asset base in that sector far beyond the statutorily expected 2.5 per cent for four years ... More importantly, the Commission began the facilitating economic development by Iwi in their own regions. ... There are now some 50 independent Maori companies in the seafood sector, which, despite a very difficult recent period, are still on their feet. There has been one failure. They learned quickly and some of them quite painfully, that this is not a sector for the faint-hearted especially those who do not have solid net asset backing.[32]

By 1992, there was increased pressure on the Crown to negotiate a final settlement. This was partly due to the issuance of a report of the Waitangi Tribunal on Ngai Tahu Fisheries, which was supportive of their traditional fishing rights, including commercial rights. Maori leaders and Crown ministers negotiated a final deal, including purchase by the Crown for the Maori Fisheries Commission, a 50 per cent interest in the Sealord company, which owned 26 per cent of the total commercial fishery quota in New Zealand. In addition, the Maori negotiators secured other benefits, including 20 per cent of all new quota to be issued and a regulatory framework providing for traditional (non-commercial) harvesting of seafood.[33] This new final settlement has been implemented both at a national level through a renewed Treaty of Waitangi Fisheries Commission run by a Maori board, and at the local tribal level, through the annual leasing of commercial fishing quota from the commission.

Eventually, the commission plans to permanently devolve fishing quota and other fisheries assets to the tribes, but there has been much controversy over an allocation formula and the matter is still contested. Some measure of agreement on a fair allocation formula amongst the Maori tribes has been reached, but the outcome is not yet settled. The fact that matter still remains in dispute stems especially from the fact that urban Maori organizations want a share of the pie and also that the settlement agreement specifies that all Maori must share in the benefits of the fisheries deal.

Part Four: What Difference did Interim Settlements and Arrangements make in New Zealand and does the New Zealand Experience apply here?

In the foregoing analysis of interim settlements and arrangements in New Zealand, there were a number of benefits which can be summarized in a few key points. First, these interim deals did have the effect of re-establishing (to a greater or lesser extent depending on the situation) a negotiating climate based more on friendly relationships in contrast to the more adversarial attitudes and approaches of the courtroom. Nevertheless, the option of returning to court or to the Waitangi Tribunal did remain an option open to Maori treaty claimants. As we have noted in the foregoing sketches of negotiations, the Crown remained a difficult treaty partner, as they often sent ambivalent signals. Perhaps these interim deals had the effect of "giving peace a chance" but both peace-like and more adversarial attitudes appeared to remain present for both sides in subsequent negotiations.

Second, the interim deals often provided a precursor of the final settlements, in that some of the final settlement ingredients were part and parcel of the interim deals. Importantly, these interim deals provided Maori tribes access to much needed resources of various kinds, and Maori were then able to take the ball and run with it, confident that the resource could be used in ways that reflected their priorities.

Third, these interim settlements allowed for the building of negotiating momentum for both Maori and the Crown. As has been demonstrated above, the interim deals served either to re-start processes or to give them some added push to keep going towards a final deal. In that sense, they represented tangible symbols of progress for the grassroots Maori people and the general public.

Fourth, these interim settlements and arrangements provided valuable managerial experience for Maori tribes in dealing with key sets of property and financial assets at strategic times. By having access to a former military base at an early date, the Waikato Tainui tribe was able to get on with the construction and development of a new tribal headquarters. By having a land bank arrangement, Ngai Tahu could have assurance that key assets were retained for settlement, and by having early access to parts of that land bank, they were able to use the assets profitably for a revenue stream. By having commercial fishing quota and other benefits under the control of their Maori Fishing Commission, many Maori tribes were collectively able to create new businesses and jobs for their members. Also, the lessons learned from one interim arrangement in one set of negotiations, such as the Ngai Tahu land bank process, could eventually be applied to other sets of negotiations.

Finally, interim agreements represent a stepping stone towards a future, final settlement, in that it is very difficult to move backwards, once an interim agreement is reached. Yet, at the same time, an interim agreement leaves the negotiating situation open, and difficult areas can be negotiated later at a more measured pace. Importantly, some issues have been resolved, and this tends to be interpreted as a confidence-building exercise for the whole process. Once negotiations are back on track with the momentum provided by an interim settlement, often neither side wants to take responsibility for walking away from the table and there tends to be renewed energy and initiative to tackle the most thorny issues.

Many (if not all) of the benefits just listed for New Zealand could well apply to the Canadian and particularly the British Columbia situation. The situation is arguably more complex here with three parties at the table, but the existence of the British Columbia Treaty Commission as the "keeper of the process" is an advantage of the negotiation process here which was not available to Maori negotiators or the Crown in New Zealand. There are other benefits or potential benefits which could be considered here in light of our particular history to date. For example, in the bitter public debate over treaties in British Columbia, interim settlements and arrangements could have an important contribution to turn around what appears, at times, to be hostile public opinion. This change in perceptions of the public would be especially true if these new developments were accompanied by appropriate public education efforts. Similarly, the goodwill on all sides of the various treaty tables generated by interim settlements and arrangements could well have unforeseen positive spin-offs in other areas of public life. For example, there could be more collaborative Crown/First Nation endeavours or private sector/First Nation joint ventures in such vital areas as fisheries and forestry because of improved relationships and negotiation climates.

Accomplishing these changes would, however, require a strong injection of political will from all quarters. Maori negotiator Robert Mahuta emphasizes the importance of political will in the following conclusion to his recent talk about the Tainui-Crown negotiations:

> As an alternative to courts, international forums, the Waitangi Tribunal or civil insurrection, the process of direct negotiation has both its advantages and disadvantages. What has been learnt is that, at the end of the day, outcomes rest solely on the political will of both parties to settle.[34]

In this regard, there may be some who would argue that there is a diminished political will to negotiate a final settlement agreement when you have an interim deal in hand. I would argue, on the contrary, that the probability of a final deal very likely increases because of a number of positive benefits from interim deals, especially for First Nations involved in a very long and difficult treaty negotiation process with few signs of success. Interim agreements fit quite well into a relationship building approach and are consistent with the 1991 British Columbia Claims Task Force. To bring two of those recommendations briefly to mind, they are:

> 1. The First Nations, Canada and British Columbia establish a new relationship based on mutual trust, respect and understanding, through political negotiation.
>
> 16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.[35]

Conclusion

Based on the evidence presented above, there would appear to be good rationale for giving interim settlements and arrangements in British Columbia an opportunity to succeed. There have been some good interim measures developed here, such as the Clayquot Sound Interim Measures Agreements, and the most recent extension of this agreement has been referred to as a "bridge" to treaty.

This agreement arose in special circumstances, however, and has been rather exceptional. More recently, the concept of treaty related measures introduced by Canada and British Columbia appears to hold promise, but these measures remain to be negotiated and implemented.

More progress is required on interim settlements in British Columbia, and the examples from New Zealand point in a variety of creative directions. In all likelihood, interim treaty arrangements and settlements will improve the situation by clearly demonstrating tangible signs of progress for the entire treaty process. Treaty negotiations and treaty relationship building is a dynamic process, and the long-term relationship implied in a treaty seems to lend itself to the production of various milestones along the way. Perhaps we need to think of relationship building as an integral aspect of any treaty negotiating process, rather than putting all our eggs in the basket of the final treaty deal, as important as it is. Relationships must be maintained even after the treaties are signed and sealed. Mutually respectful Crown-First Nation relationships will require on-going work to build the kind of just and peaceful society, which most of us want for our children and grandchildren. Interim settlements are tangible evidence to a skeptical public and local First Nation memberships that there is an evolving common will (on all sides) to move in positive meaningful directions.

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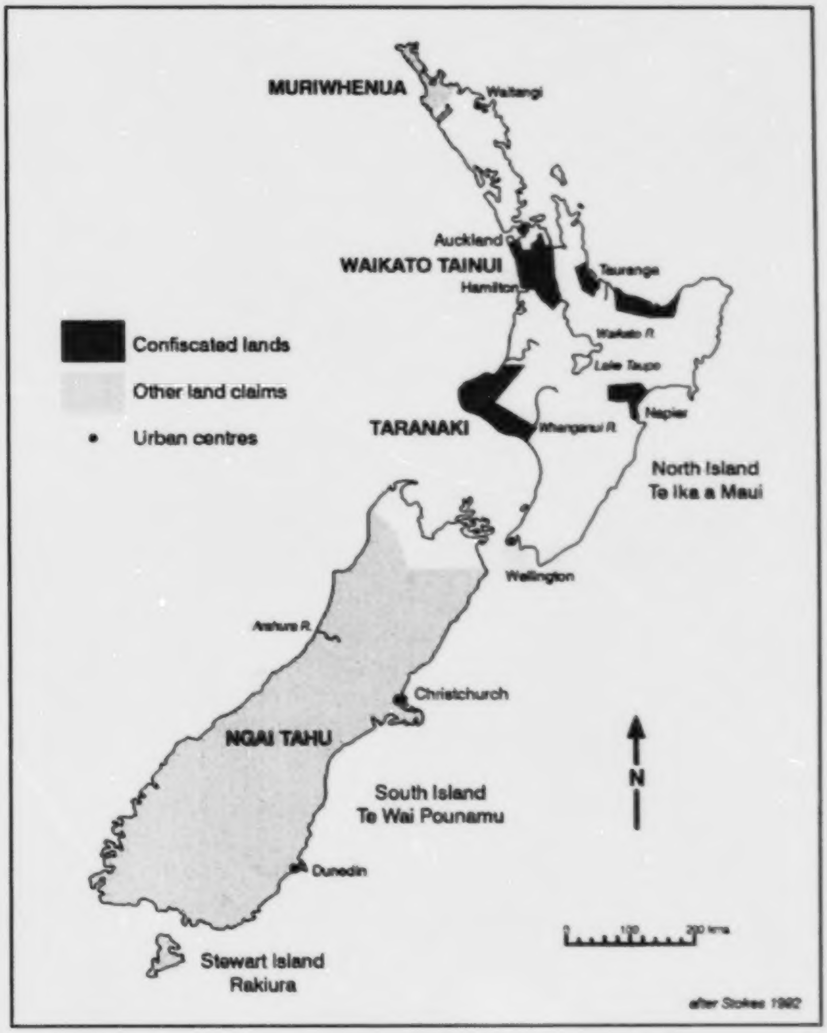
Map of Key Breach of Treaty Claim Areas in New Zealand


MURIWHENUA
Waitangi
Auckland
WAIKATO TAINUI
Hamilton
Tauranga
Confiscated lands
Other land claims
Urban centres
Waikato R.
Lake Taupo
TARANAKI
Whanganui R.
Napier
North Island
Te Ika a Maui
Wellington
Arahura R.
Christchurch
NGAI TAHU
N
South Island
Te Wai Pounamu
Dunedin
0
100
200 kms
Stewart Island
Rakiura

after Stokes 1992

REFERENCE NOTES

[1] British Columbia *Treaty Commission Annual Report 1999, "Our Future"* (Vancouver, B.C.: British Columbia Treaty Commission 1999) at 5.

[2] See for example the discussion of the articulation (and aggregation) of interests in the functional equivalences chapter in the second edition of the book by M. Dogan and D. Pelassy, *How to Compare Nations – Strategies in Comparative Politics* (Chatham, NJ: Chatham House Publishers Inc., 1990) at 39.

[3] C. Orange, *The Treaty of Waitangi* (Wellington, NZ: Allen and Unwin Port Nicholson Press, 1987) at 46, 56-57, and J. Hayward, *In Search of a Treaty Partner: Who, or What, is the 'Crown'?* (Ph.D. thesis in Politics, Victoria University of Wellington, 1995) at chap. 5.

[4] C. Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington, NZ: Allen and Unwin and Port Nicholson Press, 1990) at 39 [*hereinafter An Illustrated History*].

[5] *Ibid. at*, 38.

[6] For further study in this regard see: C. Orange, *The Treaty of Waitangi* (Wellington, NZ: Allen and Unwin Port Nicholson Press, 1987); A. Sharp, *Justice and the Maori – Maori Claims in the New Zealand Political Argument in the 1980s* (Auckland, NZ: Oxford University Press, 1990) [hereinafter *Justice and the Maori Maori*], I.H. Kawharu, *Waitangi – Maori and Pakeha Perspectives of the Treaty of Waitangi*, (Auckland, NZ: Oxford University Press, 1989); and A. Ward, *An Unsettled History Treaty Claims in New Zealand*, (Wellington, NZ: Bridget Williams Books, 1999) [hereinafter *An Unsettled History*].

[7] *An Unsettled History, ibid.* at 7.

[8] See P. Temm, *The Waitangi Tribunal The Conscience of the Nation*, (Auckland, NZ: Random Century New Zealand, 1990) and E. Stokes, *The Treaty of Waitangi and the Waitangi Tribunal: Maori claims in New Zealand* (Christchurch, NZ: Applied Geography 12, 1992) at, 176-191.

[9] *Justice and the Maori Maori, supra* note 6 at, 172-173.

[10] *Ibid.* at 168.

[11] *An Unsettled History, supra* note 6 at 35.

[12] *An Illustrated History, supra* note 4 at 109; *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R. 641 (C. of A.).

[13] *An Unsettled History, supra* note 6 at 35.

[14] Further elaboration on the Crown-Maori wars see J. Bellich, *Making Peoples A History of New Zealanders – From Polynesian Settlement to the End of the Nineteenth Century*, (Auckland, NZ: Allen Lane The Penguin Press, 1996) at, 229-246.

[15] Further information on the Waikato Tainui treaty claim negotiations see R. Mahuta, "Tainui: A Case Study of Direct Negotiations" in G. McLay, ed., *Treaty Settlements: the Unfinished Business* (Wellington, NZ: New Zealand Institute of Advanced Legal Studies and the Victoria University of Wellington Law Review, 1995) at, 67-87 [hereinafter "Tainui: A Case Study"], and D. Graham, *Trick or Treaty?* (Wellington, NZ: Institute of Policy Studies, Victoria University of Wellington, 1997) 71-79 [hereinafter *Trick or Treaty*].

[16] "Tainui: A Case Study", *ibid.* 72.

[17] *Ibid.* 76.

[18] *Tainui Maori Trust Board* v. *Attorney General,* [1989], 2 N.Z.L.R. 529.

[19] *Trick or Treaty, supra* note 15 at, 73.

[20] Dr. R. Hill, email correspondence with the author, February 1, 2000. The Crown also made an interim settlement of other land (valued at about $3 million) at the former air force base at Te Rapa but this was considered to be "on account" and thus a part of the final deal.

[21] "*Tainui: A Case* Study", *supra* note 15 at, 80.

[22] *Trick Treaty, supra* note 15 at, 53.

[23] Dr. A. Parsonson, email correspondence with the author, February 17, 2000.

[24] Waitangi Tribunal Report 1991, 174.

[25] R. Price, *The Politics of Modern History-Making: the 1990s struggle of the Ngai Tahu tribe with the Crown to achieve a Treaty of Waitangi claims settlement,* [forthcoming, Christchurch, NZ: University of Canterbury, Macmillan Brown Centre for Pacific Studies, 2000] at, 14.

[26] *Ibid.* at, 15-17.

[27] *Ibid.* at, 37.

[28] Deed of "On Account" Settlement between the Crown and Ngai Tahu, 1996 at, 6.

[29] *Ibid.*

[30] R. Price, *Assessing Modern Treaty Rights: New Zealand's 1992 Treaty of Waitangi (Fisheries Claims) Settlement and its Aftermath*, (Christchurch, NZ: University of Canterbury, Macmillan Brown Centre for Pacific Studies, Working Paper No. 3) 17 [hereinafter *Assessing Modern Treaty Rights*].

[31] Dr. T. O'Regan, *Treaty Settlements, Fisheries and the Restoration of Rights*, [unpublished draft notes for the Thomas Cawthorn Memorial Lecture, Nelson, NZ, August 6, 1999, made available to the author], at, 12. For more background, see also *An Illustrated History*, *supra* note 4 at, 111-117.

[32] O'Regan, *ibid.* at 13-14.

[33] *Assessing Modern Treaty Rights*, *supra* note 30 at, 26.

[34] "*Tainui: A Case Study*", *supra* note 15 at, 87.

[35] Canada, *Recommendations of the British Columbia Claims Task Force*, British Columbia and the First Nations Summit, 1991.

GETTING THERE!

Hamar Foster

It was with some diffidence that I agreed to provide a discussion paper for the session on "getting there." My interest in the subject of treaties is that of a legal historian and an educator, not a participant: I am neither a treaty negotiator nor am I directly involved in the treaty process. Nor – to paraphrase Leonard Cohen – do I hold a secret key that will get us to the heart of this or any other matter. But, in common with everyone else in Canada, I have a stake in the treaty process, and to me the fundamental issue in that process has always been how we are going to share the burden of history that our colonial past has bequeathed to us. Or, to put it less obliquely, how do we acknowledge the injustice and illegality of what happened in British Columbia but fashion a solution that is both workable and just in our own time?

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He will be a Fellow at the Centre for Studies in Religion and Society at the University of Victoria in 2001, working on a book entitled "We Are Not O'Meara's Children: The Quest for Aboriginal Title in British Columbia, 1849-1928."

Clearly, we all want to find ways to "get there from here," or we would not have come here today. And the Supreme Court told us in *Delgamuukw* where "there" is, although, true to form, the justices gave us precious little detail. "There" is the reconciliation of pre-existing Aboriginal rights and title with the sovereignty of the Crown. The Court said that this reconciliation should be done through treaties, reinforced by court decisions, and that it should be done because it is the right and the practical thing to do. "Let us face it, we are all here to stay." [1] Participation in the treaty process must therefore mean that we take the special constitutional rights of First Nations seriously, and also that, for various reasons, we want to reach a political settlement through negotiation rather than a legal settlement in the courts. Such a commitment will obviously involve compromise, but it may not have to involve treaties right away.

This is a forum for loosening logjams, rather than perpetuating them, so I will not address all of the objections to the current process that have been articulated over the years. I will leave aside objections to Aboriginal rights *per se*, to Aboriginal rights as collective rights, and to the idea of a limited or shared Aboriginal sovereignty, variously conceived. These ships, in my view, have sailed, and although such objections are of significant philosophical interest they are not, presumably, what we are about today.[2] Nor will I address objections to the participation of the province in treaty talks, calls for a fundamental transformation of Canada's attitude towards Aboriginal sovereignty and the differing conceptions of what the *Delgamuukw* decision really means. These are important questions, and disagreements about the latter are clearly an obstacle at many tables. But I think it is unlikely that, in most cases, definitively resolving them has to be a condition precedent to "getting there" in the short term. It cannot be, or we will not get there.

The fact is that the province *is* involved in the treaty process; that both the federal and provincial governments acknowledge that there is an inherent right of self-government of some kind; and that the courts are unlikely to frustrate these positive developments.[3] It therefore seems to me that public education about why this is so, and developing interim measures that are both fair and effective, will probably do more to advance acceptance of Aboriginal title and sovereignty, and of the process itself, than attempts to change minds at the theoretical level will. So, assuming this to be the case, what are some of the immediate problems?

Some Problems with the Current Treaty Process

The first thing that I did when I realized I was going to have to kick off the session on solutions was to remind myself of what the architects of the current process – the authors of the *Report of the British Columbia Claims Task Force* – had in mind.[4] Their *Report* was issued in 1991, a year after the Supreme Court decided the *Sparrow* case. [5] The trial in *Delgamuukw* had given some indication of how long litigating Aboriginal title might take, and B.C. had decided to reverse its 130-year opposition to negotiation. So the Task Force wanted to set out a framework for a political, rather than a legal, process that would resolve the province's infamous and longstanding "Land Question" more expeditiously than litigation would. In particular, they wanted to get beyond the federal rule that confined treaty negotiations in the province to one treaty at a time. This rule meant that First Nations were obliged to stand in line while land they regarded as theirs was exploited, and it eventually prompted some – the Gitxsan and Wet'suwet'en, for example – to go to court, instead. So, in Recommendation 9 the Task Force left the number of on-going negotiations open-ended.

But there are at least two problems with this. The first, obviously, is resources. Recommendation 11 provided that the negotiating teams be sufficiently funded, but 10 or 20 or – as it turns out – over 40 sets of negotiations are expensive. The second problem is overlapping claims. Recommendation 8 stated that First Nations had to resolve these themselves, and the expectation was that this would be done before Stage 4 (Agreement in Principle). But this is not what happened with respect to the dispute between the Nisga'a and the Gitanyow, and their overlap is now in litigation.[6]

So things have not worked out quite the way the Task Force envisioned. The problems include, in no particular order, the following. First, it seems that the province, and probably Ottawa as well, is unable to manage effectively more than a handful of Stage 4 negotiations at once (at present 37 First Nations are at Stage 4), and that it may be unwilling to commit the resources to do more than this.[7] Secondly, many First Nations do not have the capacity to negotiate a treaty, nor will they for some time.[8] (And, if history teaches anything, it is that hastily signed treaties where one party is inadequately prepared are not the way to go.) Thirdly, overlap problems have generally not been resolved. Fourthly, there is the matter of the Treaty Commission itself: is it the right model for the task? And, fifthly, there is the problem of interim measures. What happens to land claimed both by the

Crown and by one or more First Nations while everyone waits for sufficient funding to build capacity in order to settle overlaps and reach a working agreement? And what happens to First Nations whose lack of capacity keeps them lagging behind? The answer would seem to be disillusionment, frustration and a treaty process in difficulty. No doubt there are other issues, but these are sufficient to raise the question: if we are not progressing as originally intended, can we progress in other ways?

Courts

A preliminary matter is the role of the courts. I am unsure what the Law Commission meant by calling this forum, "Speaking Truth to Power." But I presume that the phrase was designed to convey the message that, at least since the 1860s, power in British Columbia has resided in non-Aboriginal governments, not in the province's First Nations; and that, although we have to be careful how we characterize our shared history, this imbalance has long been an impediment to effective treaty making. [9] Certainly if the process is to work, as it presently exists or in some modified form, concessions have to be made on all sides. No one has a monopoly on truth, and if the concessions made in the Nisga'a Treaty do not suit everyone, again, there may be other ways to proceed.

The title of the forum may also be a way of acknowledging that going to court to assert your rights is nearly always a sign of political weakness, not strength. (The strong usually have other, more effective, means.) Still, the history of the B.C. Indian Land Question shows clearly that, without courts, the treaty process may never have come into being. Indeed, although Ottawa had legal opinions supporting Aboriginal title as early as 1875, the federal government did not take such title seriously until the Supreme Court of Canada decided the *Calder* case in 1973.[10] And British Columbia did not take it seriously until several more decisions were handed down, beginning with the *Meares Island* case in 1985.[11] So, one of the questions facing the parties is, in my view, the role of the courts. If the treaty process is to achieve its goal of reconciling Aboriginal title and Crown sovereignty through just settlements, is significant judicial involvement just as essential to making treaties as it was to starting the process in the first place? If so, is a policy that sees litigation and treaty negotiation as mutually exclusive a good one? (More about this later.) Given that there are significant disagreements about such issues as what *Delgamuukw* means, the question is therefore not only whether the resources currently being assigned to the treaty process are adequate; it is also whether they are being wisely allocated. These questions also raise the issue of the role of the Treaty Commission itself.

The B.C. Treaty Commission

This is a forum convened by the B.C. Treaty Commission as well as the Canada Law Commission, so I presume that the role and status of the former is of no little interest. I also expect that the speakers and discussants who precede me will have already canvassed most of the other issues I touch upon in this paper, by the time we reach the closing session. So, it may make sense to devote the few minutes that I anticipate having to introduce the topic of "getting there" to a brief look at the Treaty Commission in its historical context.

The B.C. Treaty Commission is the third body created to grapple with the Indian Land Question in this province. The first was the Indian Reserve Commission that existed between 1876 and 1908. This Commission was created to resolve the deadlock between Ottawa and B.C. over Aboriginal title and the size of B.C.'s Indian reserves that developed shortly after confederation in 1871, and to respond to Aboriginal anger about the loss of their lands. It resolved the deadlock, but only by setting aside the question of Aboriginal title. For the first year or so of its existence it was a Joint Commission, with a provincial, a dominion and a joint commissioner as members. The province found that too expensive; so, after 1878, the Commission was composed of only one man. Disputes between Ottawa and B.C. eventually led to another deadlock, this time over which government controlled surrendered Indian land, and the province shut down the commission in 1908. The Laurier administration in Ottawa then tried to have the question of Aboriginal title in B.C. referred to the Supreme Court of Canada, but B.C. refused its consent.

When Laurier's government lost the 1911 election, the new Conservative administration dropped this idea and agreed with B.C. in 1912 to establish another body, the McKenna-McBride Commission, to address the issue of Indian lands in the province. But once again Ottawa went along with B.C.'s insistence that only reserve lands, and not Aboriginal title to lands outside established reserves, were on the table. The McKenna-McBride Commission submitted its controversial report in 1916. And, although neither it nor its predecessor was authorized to deal with Aboriginal title *per se*, both had investigative and, to a degree, decisional, authority that the current Treaty Commission lacks.

Until 1880, for example, the original Indian Reserve Commission could and did carve Indian reserves out of Crown land, including land subject to lease, without the need for provincial approval that was imposed thereafter. Both commissions, moreover, were investigative bodies (not unlike New Zealand's Waitangi Tribunal) whose detailed, factual reports are largely responsible for the reserve system – whatever one might think of that system – which now exists. The point is that, whatever the objectives that the federal and provincial governments may have had in mind at that time, they concluded that, if they wanted to accomplish anything substantial, the body established to do it had to have some clout.

Those were the strengths of the earlier commissions. Their weaknesses are, arguably, why we find ourselves where we are today. First of all, their members were all non-Aboriginal. Secondly, their mandate was to allot land on the basis of executive grace rather than Aboriginal right, and there was no authoritative judicial decision on such rights in B.C.[12] Thirdly, they were established after substantial tracts of land had already been transferred (*e.g.*, the railway transfers to the CPR on Vancouver Island), but they lacked authority to arbitrate or adjudicate conflicting titles.

Even in the 1870s, a great deal of land that was probably subject to Aboriginal title had already been either pre-empted or granted to settlers. These pre-emptions and grants were, most of them, illegal; certainly they were unjust. But, as Commissioner Gilbert Malcolm Sproat pointed out, he was not a judge and could not decide such matters authoritatively. Given the power imbalance identified above, this meant that the grant or pre-emption usually prevailed. And so did many leases. This was, in a way, the 19th century version of the tension surrounding interim measures today. And although Sproat achieved a certain degree of success in allotting "vacant" Crown land as reserves, he and his successors often ran up against the problem of pre-existing grants. As he put it when he argued against a proposal that George Vernon, B.C.'s chief commissioner of lands and works, be given a veto over the commission's allotments:

> The Vernons … and a few other large cattle owners practically have the whole country here to themselves for pasture. I do not say they have been personally unkind to the Indians but they clearly think it a novel idea that the Indians should have a full share of the natural gifts of their own country.[13]

It is this sort of talk that puts a fellow's job at risk.[14]

But I wonder if acceptance of the "novel idea" to which Sproat refers is not just as formidable an obstacle to the success of the treaty process in 2000 as it was to reserve allotment in the 1870s. After all, a "full share", based upon mutual rights rather than welfare entitlements, has been a consistent Aboriginal theme from the beginning. I also wonder if a commission that is only the "keeper" of a process that conforms to the traditional model of negotiation is the right sort of commission. For example, if the authority of negotiators to represent their First Nation is in doubt, does the Commission have adequate powers to determine this? If the capacity of a First Nation to negotiate a treaty is in doubt, or if it becomes clear that Ottawa or B.C. cannot negotiate more than a small number of treaties at a time, can the Commission do anything effective about it? And if a party is being unreasonable with respect to a particular issue or not bargaining in good faith, what can the Commission do then?[15]

In short, does a post-*Delgamuukw* Treaty Commission need more authority? Over a hundred years ago, Sproat thought that he needed more, even though he already had much more than this Commission does. And if, as appears to be the case, B.C. takes the view that it is the Commission and not the courts that should supervise the treaty process, does this not strengthen the argument for a Treaty Commission with more authority than at present?[16] After all, when the current model was established in the early 1990s, the Supreme Court of British Columbia had ruled that there were no land-based Aboriginal rights in British Columbia and that, even if there were, they fell far short of title.[17] Whatever the current disagreements about the proper interpretation of *Delgamuukw*, it clearly means a great deal more than this. It is therefore legitimate to wonder whether the 1993 model may be a little dated.

Constitutional obstacles aside, I do not suggest that a Treaty Commission with powers analogous to those of a section 96 court is either feasible or necessary.[18] But forum participants may want to consider whether one with the sort of authority enjoyed by the Waitangi Tribunal in New Zealand may be a more appropriate model. That Tribunal holds extensive and well-researched investigations; it hears evidence, oral and documentary; its reports are public documents that receive wide and detailed coverage in the media; and both the New Zealand government and the New Zealand public – Maori and Pakeha alike – take these reports very seriously.[19] The Tribunal, which has been referred to by some as the "conscience of the nation," may, in some circumstances, even make binding recommendations that the Crown should resume land that has been transferred to third parties, and restore it to Maori hapu.[20]

Litigation and Negotiation

In order to participate in negotiations facilitated by the Treaty Commission, First Nations need not prove their Aboriginal title. But if there are overlap problems or the parties cannot agree about fundamental issues, this can substantially interfere with the treaty process. So, it is conceivable that litigation may be necessary to clarify processes or rights, or even, ultimately, to settle title. Certainly, if First Nations do not resolve overlaps themselves and the Treaty Commission cannot mediate or arbitrate them, it is difficult to see how a treaty can be achieved short of resorting to litigation of some kind.[21]

Two propositions about litigating and negotiating seem to me to be true. First, in ordinary civil disputes, clarity with respect to the legal rights involved generally makes for more effective negotiation. Secondly, in ordinary civil disputes, the parties negotiate, usually on a "without prejudice" basis, both before and after the writ issues. It would therefore seem that a policy that prohibits or discourages litigation and negotiation proceeding at the same time is exceptional and needs to be justified. (Prior to the 1990s, this issue did not arise: the B.C. government denied that Aboriginal title existed, and took the position that there was nothing to negotiate. Litigation was therefore really the only option.)

So, another issue is: if the parties cannot agree on fundamental issues, and if these disagreements are substantially interfering with the treaty process, might this not be a reason to welcome a limited amount of litigation? While it is true that probably neither side wishes to “roll the dice” in a major way – that is why they are in the treaty process to begin with – litigation got us “here,” so perhaps it can get us part way “there,” as well. If so, this too has important implications for resource allocation. And if the prospect of more litigation is daunting, all the more reason to make the current negotiating process more effective.[22]

Interim Measures

When a First Nation in the treaty process objects to resource development on possible Aboriginal title lands, the premise that title need not be established to join the treaty process is rendered operationally meaningless if such development is justified by pointing to the absence of proof of title. It is true that most of the obligations that *Delgamuukw* places on government depend upon the existence of Aboriginal rights or title. But, if governments make this fact their response to Aboriginal objections to development, what happens to the most important short-term benefit of the treaty process, *i.e.,* the reconciliation of Crown sovereignty and Aboriginal title *during* treaty making? And where is the incentive to join the process, instead of going to court or asserting rights directly, on the land? Obviously, governments must keep the economic well-being of the province as a whole in mind. But what is the point of a treaty process if the difference between standing in line at the treaty table in 1989, and sitting at the tri-partite table in 2000, is increasingly seen as little more than employment for treaty negotiators and what detractors derisively call the "Indian industry"?[23] Given the complexity of the issues involved, and the reality that many First Nations will lack the capacity to make an effective treaty for years to come, shouldn't there be a strong and well-resourced commitment to reconciling Aboriginal title and Crown sovereignty now, on an interim basis?

Conclusion

It may therefore be that the difficulties outlined above mean that the parties should take the treaty process in a new direction. This could be done by modifying negotiating positions, by assigning more authority to the Treaty Commission, by funding litigation designed to seek judicial clarification and by amending legislation to incorporate *effective* interim measures as a fundamental part of the legal regime of British Columbia. Indeed, if resources are limited and capacity is an issue for all parties (although in different ways), a strong interim measures regime may be a better solution than proceeding with a process that is not sustainable in terms of its original goals. This would not mean abandoning the treaty process, but reforming it. It might even be a way of responding to both Aboriginal critics of the Nisga'a Treaty – who worry that the Nisga'a conceded too much – and also non-Aboriginal critics – who worry that the Crown conceded too much and that this concession is set in "constitutional cement."[24] There are many paths to reconciliation, and "template" thinking – at least as that term is sometimes used – suggests wisdom that none of us possesses.

Where overlap and representation issues have been resolved, First Nations who are satisfied that they can negotiate a treaty that meets their needs should do so. But, currently, this is not the case with many First Nations. That fact suggests that more of the resources for the treaty process should be re-directed towards creating an interim measures regime that, if successful, may even evolve into a way of reconciling Aboriginal rights and Crown sovereignty that will not require a land selection treaty in the conventional sense. Such a regime would enable First Nations to participate in the management and wealth of their traditional territories while difficulties in the treaty process are sorted out, and experience gained thereby might well contribute to new, long-term accommodations.

In short, through a combination of strategies, many of the goals of the process may be achievable, at least in the short- to medium-term, without some of the problems of the present process. By then, many facets of Aboriginal title and sovereignty may have been worked out on the ground, and the Nisga'a Treaty (and other models of treaty making) can be compared with what has emerged from focusing on workable interim measures. The main alternative to these strategies is land selection by litigation, *i.e.*, the very thing the treaty process was designed to avoid.

It is undeniable that we have a long way to go before we reach Sproat's "novel idea" about Aboriginal people having "a full share of the natural gifts of their own country." But we should not lose sight of the fact that we have come a long way, as well. Prior to 1990, everything this forum is discussing was largely academic in B.C., and the burden of history to which I referred earlier had been shrugged off by converting rights into welfare benefits – with the wretched results that were predicted as early as 1927 and that are so evident today.[25] So we should not be surprised when, a mere decade later, we discover that our first attempt at doing better may have some serious flaws. There is, however, no going back.

Other Publications

"Aboriginal Title and the Provincial Obligation to respect it: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998), 56 Advocate 221

"Indigenous Peoples and the Law: The Colonial Legacy in Australia, Canada, New Zealand, and the United States" in Johnston and Ferguson, eds. *Asia-Pacific Legal Development* (UB.C. Press 1998) at 466-500.

"Honouring the Queen: A Legal and Historical Perspective on the Nisga'a Treaty" (1998/99), 120 *B.C. Studies* 11-35

"'Indian Administration' from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights" in Paul Havemann, ed. *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford UP, 1999) at 351-377.

"A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" in Baker and Phillips, eds. *Essays in the History of Canadian Law, Vol. VIII* (Toronto 1999) at 171-212.

"Fighting the King's War: Harris Smallfence, Verbal Treaty Promises and the Conscription of Indian Men, 1944" (1999), 33 *UB.C. Law Review* 53-74 (co-authored by R. Scott Sheffield).

REFERENCE NOTES

[1] *Delgamuukw* v. *British Columbia* (1997), 153 D.L.R. (4th) 193, *per* Lamer, C.J., at para. 186.

[2] The Supreme Court in *Delgamuukw* could have rejected a s. 35 right to self-government, but did not. And although the *extent* to which Aboriginal self-government is a constitutional right under s. 35 of the *Constitution Act*, 1982, remains an issue, that it is a right seems clear. [Some months after the forum concluded, the Supreme Court of British Columbia confirmed this view in *Campbell et al.* v. A.G. B.C., A.G. *Canada & Nisga'a Nation et al.* (B.C.S.C, July 24, 2000, Vancouver Registry No. A982738).]

[3] See *Campbell, ibid.*

[4] See the *Report of the British Columbia Claims Task Force* (June 1991) [hereinafter *1991 Report*]. I also looked at something Mr. Alan Grove and I wrote about treaties in 1992, just as the process was getting started. He and I raised concerns in that paper about several issues. These included the lack of capacity in many First Nations to negotiate effectively (the uneven playing field), the danger of wasting money by doing research that had already been done or that others were also doing (re-inventing the wheel), and the inadequacy of the rules of evidence (oral history). We also thought that educating both the public and a sufficient number of specialists was critically important, and warned against telling a story in which only one side wears the black hats. See Foster and Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993), 27 *U.B.C. L. Rev.* 213.

[5] *Regina* v. *Sparrow* (1990), 56 C.C.C. (3d) 263.

[6] Admittedly, the Nisga'a Treaty negotiations began long before the B.C. treaty process and were concluded outside it. Still, most of the important negotiating took place after 1993.

[7] The figures are from the *Treaty Commission Annual Report, 1999,* at 15 [hereinafter *Treaty Commission 1999 Report*].

[8] See Foster and Grove, *supra* note 4 at 246-251.

[9] Art Manuel noted recently that his father, George Manuel, could at least go to opposition politicians for help against the government, but that today he could hardly look for the same help from the federal Reform Party [now the Alliance] or the B.C. Liberals. True. But of course the reason the official oppositions in Ottawa and B.C. are of little help to him is that it is now the government that supports Aboriginal title and the treaty process (even if many think that support inadequate). This, surely, represents progress.

[10] *Calder* v. *A.G. B.C.* (1973), 34 D.L.R (3d) 145. For these early legal opinions, and especially an extensive one commissioned in 1909, see "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" in Baker and Phillips, eds. *Essays in the History of Canadian Law*, vol. VIII (Toronto, 1999) at 171.

[11] *Macmillan Bloedel Limited* v. *Mullin et al., etc.* (1985), 61 B.C.L.R. 145 (B.C. C.A.).

[12] There was *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 at 59 (J.C.P.C.), which stated that a province cannot use Indian lands as a source of revenue until "the estate of the Crown is disencumbered of the Indian title." But B.C. took the position that, uniquely, there was no Indian title in the province.

[13] Sproat to the minister of the interior (Ottawa), 27 Oct. 1877, NAC, RG10, vol. 3656, file 9063.

[14] Sproat resigned in 1880 in protest over Ottawa's refusal to approve self-government initiatives in the interior.

[15] The Agreement signed by the parties in September, 1992 deals with some of these issues, but the wording is rather general.

[16] This is apparently the province's position in the *Luuxhon* appeal: see *Treaty Commission 1999 Report, supra* note at 37, and the B.C. S.C. decision in *Luuxhon* at [1999] B.C.J. no. 659.

[17] See the trial decision in *Delgamuukw*, (1991), 79 D.L.R. (4th) 185 (B.C. S.C.).

[18] See P. Hogg *Constitutional Law of Canada* (Carswell 1992), chap. 7.

[19] See, for example, *The Taranaki Report* (1996). In this country the Indian Claims Commission more closely resembles the Waitangi Tribunal, but it does not deal with comprehensive title claims.

[20] With compensation to the third parties: see R.P. Boast, "The Waitangi Tribunal: 'Conscience of the Nation,' or Just Another Court?" (1993), 16 *U.N.S.W. L. J.* 223 at 227-228.

[21] Recommendation 14 of the 1991 *Report* (*supra*, note 4) states only that the commission should "provide advice and assistance in dispute resolution as agreed by the parties."

[22] Lawyers, by the way, will likely be as involved in the one as the other; so while tiresome references to enriching the legal profession through litigation

may make one feel good, they are largely beside the point. Like it or not, litigation is how many important changes take place in societies governed by the rule of law, and if it works for governments and corporations, why not First Nations?

[23] As one of the people I spoke to reported rather sadly, the main change he had heard about since treaty talks began was that the negotiators were driving newer cars. He was referring to only one of the three parties, but thought that it probably applied more generally. I do not say that this is necessarily a fair comment; but the fact that such things are being said is a concern.

[24] Although, as the court in *Campbell* (*supra*, note 2 at 52-53) noted, the cement may not be dry: even treaty provisions may be subject to statutory limitations if they can be justified under the test laid out in *Sparrow* (*supra*, note 5). On this subject see R. v. *Badger* [1996] 1 S.C.R. 771 at 812-813.

[25] See the remarks of Allied Indian Tribes of B.C. chairman Peter Kelly to the parliamentary committee that looked into that organization's grievances in April of 1927, quoted in "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law, vol. VI* (Toronto, 1995) 28 at 68.

SPEAKING TRUTH TO POWER: A TREATY FORUM

Summary

The organizers of the "Speaking Truth to Power" forum agreed to provide a summary of the discussions from the floor that followed each of the sessions. The B.C. Treaty Commission compiled the summary.

It is not the minutes of "Speaking Truth to Power" and, except for the closing remarks by the facilitator and the co-conveners, no comments are attributed to individual participants.

The opinions expressed – always frank and sometimes passionate and even angry – are those of the wide range of participants who were present and do not necessarily represent the views of either the Law Commission or the Treaty Commission.

Session 1: Historical and Constitutional Perspectives

Early in the discussion, the question was asked as to whether the purpose of the forum was to:

- forge a single perspective on the constitutional, legal, and historical issues among the diverse participants in the forum; or
- acknowledge the participants' different perspectives and reach forward-looking solutions to improve the viability of the B.C. treaty process and address those practical, non-legal concerns that were uppermost in the minds of the public.

These two elements were to colour much of the ensuing discussion in this and the second session. Predictably, no single answer to these questions emerged. On the one hand, it became increasingly clear that forging a single perspective would be unlikely, given the participants' divergent interpretations of the jurisprudence on key issues, particularly Crown sovereignty, and, by extension, on the starting point for negotiations. On the other, it was noted that the process of reconciling past and future is an on-going one, and that it is not necessary or possible to exhaust the one element before addressing the other.

Participants were told that First Nations should not be expected to abandon who they are as a precondition of entering those negotiations, or negotiate for what they already have as an inherent right. The forum heard how First Nations history, customs, and law lived on in the current era and were integral to First Nation self-identity, to their relationship to the land, to why First Nations were in the treaty process, and to what it was they sought to have recognized and affirmed through negotiations.

Nor should First Nation history, customs, and law be seen as static. Without going into detail, one speaker referred to 10 recent sectoral agreements between the Mohawk and the Quebec government that illustrated the persistence of the Aboriginal legal order as a non-frozen inherent right.

Indeed, it was precisely the evolving nature of Aboriginal societies that was highlighted in another exchange. In this view, Canada, too, is an evolving concept. First Nations wished both to secure their survival and to be part of Canada's future evolution by engaging in a dialogue of intergovernmental power-sharing with Canada and B.C. Section 35 of the Constitution, recognizing and affirming current and future Aboriginal and treaty rights, was the access point for that dialogue. First Nations, it was suggested, wished to be a living branch on a living constitutional tree.

Part of the blame for non-Aboriginal ignorance of First Nations history and aspirations was laid at the door of the education system, which was seen as perpetuating a colonial mind-set. This mind-set prevented the parties at the negotiating tables from being able to focus on new, forward-looking relationships and needed to be changed, especially as the federal and provincial parties held so much of the power to address the status quo. One

First Nations speaker called on non-Aboriginals to be the voice of Aboriginals, just as the Philanthropists had been in the struggle to abolish slavery in the early 19th century. But it was also noted that reaching treaties is a common challenge, albeit with singular elements, and that all parties could and should rise to that challenge.

Why, it was asked, would the federal and provincial governments not put First Nations' underlying title, jurisdiction, legitimacy, and sovereignty on the negotiating table, given their importance to First Nations? This question was to recur in a subsequent session and was responded to at different points by both federal government and non-government participants.

One response was that land title and law-making authority were on the table, but that most Canadians and the federal government could not accept that the Crown's underlying sovereignty and title were negotiable. It was, however, also noted that other Canadians have principled objections to the treaty process as leading to what they see as race-based legal systems.

The second was that it was the *idea*, the *theory* of First Nation self-determination that gave rise to most fear and stood in the way of agreement among the parties. The suggestion was made that a more fruitful approach might be for the parties to look at self-determination in more concrete terms of multiple jurisdictions, of who would own which resources, of who would run city governments, etc. – in short, to try to imagine what B.C. would look like on the ground the day after a treaty is signed. This approach might enable parties to more realistically understand the scope of First Nation self-determination and the scale of its implications for the existing political make-up of British Columbia.

At the end of the session, one participant noted that there appeared to be a principled and practical basis for participants to move their discussions forward. None denied the existence of Aboriginal rights, although there was not agreement on their scope. All agreed that treaties could contribute to an enduring definition of rights. Participants recognized, in the words of the Supreme Court, that we are all here to stay. And they agreed that there was a need to move from the status quo and to discuss the altered jurisdictional and land arrangements that would allow First Nations to sustain themselves without having to abandon their history and identity.

Session 2: Ethics of Negotiation

The challenge of reconciling past and future spilled over into the second session.

At the outset, the question was again posed as to why the federal and provincial governments would not negotiate those issues of pre-existing rights, title, and sovereignty and of compensation that First Nations had identified as vitally important and that the courts had directed should be negotiated.

Part of the answer, as several speakers noted, was that non-Aboriginal governments and society had difficulty in confronting the past because much of that past was shameful. Acknowledging that history raised the prospect of giving up psychic as well as material resources.

Another response to the opening question was that treaty making should be seen as only part of the new government-to-government relationship. Treaties, it was suggested, are not intended to be a panacea, but provide a basis for moving from the present into the future by addressing self-government, land and resources, and future rights. This was described as a more constructive approach than becoming bogged down in the past.

By contrast, the view was also expressed that it was precisely on the basis of pre-existing rights and title – the past – that First Nations were negotiating, and that a process which allowed any one party to dictate the agenda and scope of negotiations was a dishonest process. Moreover, First Nations' historical experience and distrust of government coloured their view of the need for and characteristics of a new relationship. The related point, first broached in the preceding session, was again made that in British Columbia and elsewhere in Canada it is not only First Nations who bring their history into the negotiations: Canada and B.C., for example, bring their sovereignty to the negotiating table in the form of ss. 91 and 92 of the Constitution that respectively deal with federal and provincial spheres of jurisdiction.

A fourth perspective was that, while First Nations and the other parties need not have common visions of treaty, they should mutually acknowledge their respective perspectives and priorities. The point was made that the solitudes could never be bridged and the parties could never reach agreement without some level of shared understanding of what it is that is being negotiated. Exclusive emphasis on the forward-looking nature of treaties ran counter to that requirement and the reality that the treaty process was rooted in history and the law.

Several participants focused on the issue of compensation. It was noted that in the treaty process the federal government does not negotiate compensation for past infringements of a First Nation's rights and title. Canada has taken the view that compensation is a legal matter, involving a legalistic burden of proof and valuation issues, better addressed in forums other than the treaty process, which was one of political negotiations. One participant asked whether, given that Canada does not negotiate compensation for past infringements as an element of treaties, it would require First Nations to release all such claims, in the interests of attaining finality through treaties.

Others responded that third parties affected by treaties would be compensated. They reiterated the point that the courts themselves had repeatedly identified negotiation as the most appropriate method to address compensation. As well, the question was raised whether the final agreement would require Canada and B.C. to be released from further claims for compensation for past infringements of Aboriginal rights and title. The reply was that the situation would be dictated by the terms of the final agreement.

One participant captured the overall thrust of these exchanges by noting that it was only now that the major differences in visions of and approaches to treaty were becoming clear. Indeed, two competing models of treaty had crystallized, distinguished by differences on the issues of prior recognition of Aboriginal rights, compensation, land selection, and the finality of treaty rights. These differences were compounded by disagreements among the parties about the cost, pace, and bureaucratic nature of the negotiation process, and the presence or absence from it of mutual respect. The challenge for all the parties was to establish whether there still existed a compatible view of treaty making by identifying the issues that divided them and by trying to bridge those differences.

Another pointed to the need for political intervention to restore the fading prospects of the treaty process. It was also suggested that the Treaty Commission revisit the founding charter of the treaty process, the *B.C. Claims Task Force Report*, 1991, to establish the degree to which it had been honoured by the parties and its continuing relevance to the process. The role of the Treaty Commission, which was designed pre-*Delgamuukw*, should form part of the subject matter of this re-examination.

And again, the importance of education to the treaty process was stressed. The forum heard that treaty negotiations could provide a long-term educational opportunity between cultures. Mutual understanding would displace the will to dominate at the negotiation table. Greater support for publicly funded Aboriginal-controlled educational institutions would help lay the basis for greater dialogue and mutual understanding.

Session 3: Visions of Certainty

Given the divergent views that had been aired in the previous two sessions, the forum was called upon to concentrate on the convergences and the common ground among the parties. It was noted that all participants agreed that there had been grave injustices, there was continuing despair, and that there are legal issues that are best resolved through negotiations.

The suggestion was made that the forum should, in addressing certainty, give consideration to how the parties in the treaty process could build trust and progress and live success through an incremental process of Interim Measures, Treaty Related Measures, economic development initiatives and greater community control over key issues. In this view, certainty was a matter of both relationships and rights, and treaties needed to be built as well as negotiated.

These opening comments set the course for much of the discussion from the floor.

On certainty, several participants noted that absolute certainty was unattainable. For example, the James Bay Agreement, which contained "cede, release, and surrender" language, was the subject of seven legal challenges, and had needed to be amended. Moreover, legal definition by the Supreme Court of Canada of the key characteristics of a free and democratic society not only seemed to be internally irreconcilable, but also precluded any notion of complete certainty. Both of these circumstances pointed to the need for new certainty options.

Others agreed that the treaty process appeared to be stuck, and that certainty posed a significant challenge. It was noted that the business sector was unwilling to consider a new certainty model, such as a conditional non-assertion model, and investor confidence was unlikely to be built on a treaty that dealt only with relationships and did not address post-treaty rights.

Despite these challenges, agreement had been reached with the Nisga'a. It was suggested that there be greater focus on the practicalities of reaching agreements. In this spirit, revenue sharing and some form of co-management of resources were suggested as suitable themes for future workshops. Another speaker called on First Nations to work more closely together so that agreements and partnerships could be built in a timely way, without the need for multiple sets of identical negotiations.

Several participants representing a cross-section of business and economic interests picked up on the theme of building treaties on the ground through Interim Measures and other initiatives.

One noted that the current process had bogged down because it was too ambitious, had engendered unrealistic expectations, was driven too much from the top down, and involved too many tables, some of which had little history of negotiating major agreements. A more grassroots approach to treaty negotiations was needed. Treaties were a more likely prospect, it was suggested, if they were prefaced by successful arrangements and partnerships among First Nations, business, government and others. These would empower First Nations by enabling them to build capacity and their people to rebuild their sense of self-worth and of control over their lives. They would also foster greater mutual trust and confidence among the various parties and interests in the field.

Clearly, such initiatives could be realized through Interim Measures, but they also needed more resources, more money on the table, and more political will from the federal and provincial governments.

Another speaker pointed to the New Zealand experience to further underscore the importance of interim measures, notably those that protected resources pending the finalization of treaties. New Zealand also provided examples of ways in which those resources could be protected, such as land banking.

A cautionary note was sounded by another participant about a gradualist approach to treaty building. It was remarked that even those forest companies that had developed good relationships with First Nations were not immune to blockades, disruption, and the hampering of forestry development plans. Indeed, First Nations appeared to be using those companies as leverage to gain the attention of governments. The corollary is that governments had to be key players in the process of building treaties.

Notwithstanding this situation, none of the participants disagreed in principle with Interim Measures. Indeed, it was noted that those sectors of the forest industry that had hitherto rejected the idea of Interim Measures, no longer did so. Instead, they now were looking at Interim Measures in more specific terms to determine whether they would deliver benefits to First Nations sooner rather than later, allow economic development to continue, and serve as an incentive for reaching final agreements.

Session 4: Getting There

During this session, many First Nations participants returned to the issues that had been stressed or touched upon earlier in the day.

These included:

- the fragility and flawed nature of the treaty process;
- the governments' refusal to recognize Aboriginal rights and title at the outset of negotiations;
- the incomprehensibility of purely forward-looking negotiations, given First Nations' close cultural and ancestral ties to lands and resources, and their wish to maintain that relationship on a sustainable footing as a basis for social justice;
- the unacceptability of extinguishments of Aboriginal rights and title as a technique to build a new relationship among First Nations, Canada, and B.C.;
- the continuing poverty of First Nations and the legitimacy of compensation for those lands that others had occupied and for those resources that others had exploited and exhausted; and
- the high level of debt that First Nations were accumulating during the negotiations.

In the course of these remarks, one participant questioned the good faith of those negotiating parties whose apparent intent was to perpetuate the status quo.

Several speakers remarked that the forum had allowed them to crystallize their understanding of the parties' differing perspectives. However, they felt that the forum had been too short for them to raise all their concerns, to grapple fully with the underlying issues, or to take the next step towards meeting the challenges facing the treaty process.

A number of speakers offered suggestions about how this could be done. One suggestion was that First Nations' traditions of democracy and confederation could provide the parties with a partnership framework that could be an alternative to the extinguishment of Aboriginal rights and peoples. Another mentioned the experience of the Northwest Territories constitutional forum on self-government in breaking impasses. A third suggestion was that business could foster a new relationship with First Nations by offering them seats on corporate boards. A further suggestion was that other forums like the current one be convened on a more finite basis to work towards non-binding solutions of those issues that the negotiating tables had identified as deal-breaking.

Closing Comments

In his summation, the facilitator remarked that much truth had been spoken that day. This truth was that:

- treaties were about relationships among peoples and needed to look to the past and the future;
- certainty was a question of respect, clarity, evolving relationships, and not finality;
- Interim Measures and business ventures were important indicators of the progress and worth of the treaty process;
- BCTC's role should evolve, perhaps along the lines of the Waitangi Tribunal.

All those present had the power to educate their constituents and the broad public with whom power lay, and broad public support was needed to give effect to the ideas of this forum.

Rod Macdonald of the Law Commission acknowledged that anger and frustration had been heard, but also ideas for the future. He picked up on the notion of a wider dialogue so that the general public in British Columbia could better understand the character of the treaty process as symbolizing a new relationship, not just as a means to hand over resources, land and money. This had implications for the Treaty Commission's public education priorities. He concurred that the treaty process was not just a political process and that more joint business ventures and co-management initiatives were needed to demonstrate that the 21st century could contribute positively to First Nation socio-cultural, political, and economic health and prosperity. Finally, he noted that, unless government negotiators persuaded their principals to reframe the treaty process as something greater than a means to settle land claims, the process would only incompletely address First Nation concerns and would be unlikely to yield creative outcomes.

Miles Richardson echoed the need for more informed dialogue about treaty issues and increased political support for the treaty process. He acknowledged that the treaty process had been the subject of much discussion that day and was not perfect. But he reminded participants that the process was only six years old and in his view had been a worthwhile investment. As well, he noted, the treaty process was owned by all, and could be made by them to unfold differently.

In reviewing the day's exchanges, he pointed to the need for:

- timely visioning about what treaties are in order to promote mutual understanding and trust;
- a review of and rededication to the fundamental commitments made at the outset of the process in the *B.C. Claims Task Force Report*, 1991; and
- honest mutual recognition among the parties, with all of them agreeing not to bring preconditions to the table.

The reaction to the Agreement in Principle offers that had been made to a number of First Nations in the B.C. treaty process in the fall and winter of 1999-2000, showed that there was tough work ahead on issues such as certainty, Interim Measures, the role of the Treaty Commission. But as the day's events and constructive comments had shown, he continued, there is growing acceptance of the need for a new relationship and for Interim Measures. Further progress would be built through more forums such as Speaking Truth to Power, and a greater focus on the common interests among the parties

APPENDIX

FORUM AGENDA

March 2		
7:00 p.m.	Opening Ceremony	
	Welcoming Remarks	Rod Macdonald, President, Law Commission of Canada Miles Richardson, Chief Commissioner, BC Treaty Commission
	Keynote Address	Jim Tully, Political Science Dept., University of Victoria
March 3		
8:30 a.m.	Historical and Constitutional Perspective	Andrée Lajoie, University of Montreal, Faculty of Law John Borrows, University of Toronto, Faculty of Law
	Comments	Michael Asch, University of Victoria, Dept. of Anthropology Geoff Plant, MLA
	Discussion	
10:00 a.m.	Break	
10:30 a.m.	Ethics of Negotiations	Rod Macdonald, President, Law Commission of Canada Trudy Govier, Philosopher and Author
	Comments	Louise Mandell, QC – Counsel, Union of B.C. Indian Chiefs Tom Molloy, Federal Chief Negotiator
	Discussion	

12:00 p.m.	Lunch	
1:30 p.m.	Visions of Certainty	Mark Stevenson, Former Provincial Chief Negotiator Richard Price, UVIC
	Comments	Jerry Lampert, President, Business Council of BC Roberta Jamieson, Former Ontario Ombudsman
	Discussion	
3:00 p.m.	Break	
3:30 p.m.	Getting There	Hamar Foster, UBC, Faculty of Law
	Comments	Ed John, Task Group Member, First Nations Summit
	Discussion	
4:30 p.m.	Closing Remarks	Rod Macdonald, President, Law Commission of Canada Miles Richardson, Chief Commissioner, BC Treaty Commission